

No. 16470 ✓

VOL 3112

United States
Court of Appeals
For the Ninth Circuit

CARL E. OAKS, WILLIAMS BROTHERS COMPANY, McLAUGHLIN, INC., and MARWELL CONSTRUCTION COMPANY, LTD.,

Appellants,

vs.

STUART CONSTRUCTION CO., INC., a Corporation, and STUART E. TOPE,

Respondents.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 342)

Appeal from the District Court
of the District of Alaska,
Third Division

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For Appellee.

In the District Court for the District of
Alaska, Third Division

No. A-10,656

UNITED STATES OF AMERICA, for the Use
and Benefit of STUART CONSTRUCTION
CO., INC., a Corporation, and STUART E.
TOPE, an Individual,

Plaintiffs,

vs.

CARL E. OAKS, J. BUTCHER and J. E.
NOONAN, d/b/a Oaks Construction Com-
pany; WILLIAMS BROTHERS COM-
PANY; McLAUGHLIN, INC., and MAR-
WELL CONSTRUCTION COMPANY,
LTD.,

Defendants.

COMPLAINT

First Cause of Action

I.

That the plaintiff, Stuart Construction Co., Inc., is an Alaskan corporation and has complied with all Territorial requirements precedent to bringing this suit; that the defendants, Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., entered into a sub-contract with Williams-McLaughlin for a portion of the construction of the Pipeline Products System

from Haines to Fairbanks, Alaska, U. S. Army Corps of Engineers, Project No. ENG.-95-507-54-1, and that subsequently and on December 15, 1953, the defendant, Oaks Construction Company entered into a sub-contract with Williams Brothers Company for the clearing and grading of the Pipeline Products System and on December 17, 1953, the plaintiff, Stuart Construction Co., Inc., entered into a sub-contract with the defendant, Oaks Construction Company whereby the plaintiff corporation would furnish tools, labor, equipment and supplies to clear a portion of the right of way along said pipeline, a copy of said contract being attached hereto as Exhibit "A" and made a part hereof; that the defendant companies were bonded as provided by Title 40, U.S.C., Section 270A, that this cause of action is brought under the provisions of Title 40, USC 270B, and that one year has not elapsed after the date of final settlement of the above-mentioned contracts.

II.

That the plaintiff corporation performed according to the terms of said contract and has due and owing to it from the defendant, Oaks Construction Company, the sum of Fifty-three Thousand Six Hundred Twenty Dollars (\$53,620.00), which the defendant, Oaks Construction Company, refuses to pay.

Second and Alternative Cause of Action

I.

That the plaintiff, Stuart E. Tope, furnished equipment and rendered services to the defendant, Oaks Construction Company, in connection with the clearing of a right-of-way on the Haines to Fairbanks pipeline system of the reasonable value of Fifty-three Thousand Six Hundred Twenty Dollars (\$53,620.00) which the defendant, Oaks Construction Company, refuses to pay.

Wherefore, the plaintiff, Stuart Construction Co., Inc., prays for judgment against the defendants in the sum of Fifty-three Thousand Six Hundred Twenty Dollars (\$53,620.00) on its first cause of action, or, in the alternative, that the plaintiff, Stuart E. Tope, have judgment against the defendant, Oaks Construction Company, in the sum of Fifty-three Thousand Six Hundred Twenty Dollars (\$53,620.00) on the second cause of action; for costs, disbursements and a reasonable sum as attorneys' fees.

McCUTCHEON & NESBETT,

By /s/ BUELL A. NESBETT.

Duly verified.

EXHIBIT "A"

Oaks Construction Company
General Contractor

Agreement With
Stuart Construction Company
Box 517, Anchorage, Alaska

for

The furnishing of all tools, labor, equipment and supplies to clear a portion of the right of way of the Haines to Fairbanks, Alaska; Products Pipeline System, C. E. Project No. Eng-95-507-54-1, as hereinafter described.

Amount: \$5,000.00 or more or less at unit prices as shown herein.

Dated: December 17, 1953.

Date of Completion: One hundred and twenty calendar days.

Subcontract Agreement

This agreement made this 17th day of December, 1953, by and between:

Oaks Construction Company, party of the first part, hereinafter called Oaks, and

Stuart E. Tope as President of Stuart Construction Company, Inc., party of the second part, hereinafter called Subcontractor, which said Subcontractor is a corporation existing under the laws of the Territory of Alaska, doing business at Box 517,

anchorage, Alaska, under the firm name and style of Stuart Construction Company, Inc.

Witnesseth:

Whereas, the joint venture of Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., has heretofore entered into a subcontract with Williams-McLaughlin for a portion of the construction of the whole Pipeline Products System from Haines to Fairbanks, Alaska, U. S. Army Corps of Engineers, Project No. Eng-95-507-54-1 and

Whereas, Oaks Construction Company has heretofore entered into a subcontract with Williams Bros. dated December 15, 1953, involving clearing and grading on the above Products Pipeline system.

Now, therefore, in consideration of the covenants and agreements hereinafter contained and payments to be made as hereinafter provided, Oaks Construction Company and Stuart Construction Company, Inc., do hereby mutually agree as follows:

Article I. Performance of work.

The Subcontractor shall furnish all materials, supplies and equipment, except as otherwise herein provided, and perform all labor required for the completion of the said work in accordance with all provisions of the original contract and subcontracts and of the specifications and plans referred to

therein, all of which are hereby made a part of this agreement, and under the direction and to the satisfaction of the Principal's engineer or other authorized representative in charge of said work. The Subcontractor's employees shall not exceed the number required to do the work efficiently and within the time specified herein for the completion of the work, and the wages received by them shall be the same as that paid by the Contractor for similar work, excepting only as provided and described in Article XXI.

Article II.

To be bound by the terms of the subcontract between Oaks Construction Company and Williams Bros., including every part of and all the general and special conditions, drawings, specifications, and addenda in any way applicable to this subcontract; and also by the provisions of this contract which are hereby referred to and made a part of this subcontract.

Article III.

To assume toward Oaks Construction Company, so far as the Subcontract work is concerned, all the obligations and responsibilities which Oaks Construction Company assumes towards Williams Bros. by his Contract, which includes the general and specific conditions thereof, and the plans and specifications thereof, and the plans and specifications and addenda, and all modifications thereof

incorporated in the documents before their execution. The Subcontractor agrees not to assign or sublet said work or any portion thereof without the written consent of Oaks Construction Company.

Article IV.

To start work immediately when notified by the Contractor, and to complete the several portions and the whole of the work herein sublet, at such times as will enable Oaks Construction Company to fully comply with the contract with Williams Bros., and to be bound by any provisions in the Oaks-Williams Bros. Contract with Williams-McLaughlin for liquidated damages, if caused by the Subcontractor.

Article V.

To submit to Oaks Construction Company applications for payment at such reasonable times as to enable Oaks Construction Company to apply for and obtain payment from Williams Bros. and to receive payment from Oaks Construction Company as the work progresses, but only after the Oaks Construction Company shall have received payment from Williams Bros.

Article VI.

Oaks Construction Company may, without invalidating this Subcontract, order extra work or make changes by altering, adding to, or deducting from the work; the price herein being adjusted ac-

cordingly. All such work shall be executed under the conditions hereof, and of the Oaks-Williams Bros. Contract, except that any claim for extension of time caused thereby must be agreed upon at the time of ordering such change.

Article VII.

To make no claims for extras unless the same shall be fully agreed upon in writing by Oaks Construction Company prior to the performance of any such extra work, nor shall any extra work be allowed or paid for, in any event, unless the same is first allowed and paid for by the Williams Bros. to Oaks Construction Company.

Article VII.

That he has the status of an employer as defined by the Unemployment Compensation Act of the Territory, and all similar acts of the National Government, and including all Social Security Acts; that he will withhold from his payrolls the necessary Social Security and Unemployment reserves and pay the same; that Oaks Construction Company shall in no way be liable as an employer to or on account of any of the employees of the Subcontractor; that the Subcontractor will as an employer, to the extent of any of his employees under this Contract, conform to all the rules and regulations of the Social Security Acts and Unemployment Commission created by said laws, and that he will furnish satisfactory evidence to Oaks Construction Company that he is conforming to said

laws, rules and regulations. The Subcontractor hereby releases and indemnifies Oaks Construction Company from any and all liabilities under the said laws.

Article IX.

That the Subcontractor will pay any and all federal, territorial and municipal taxes, including sales taxes, if any, for which the Subcontractor may be liable in connection with the labor and materials herein, or in carrying out the Subcontract, prior to final payment being made to him.

Article X.

To pay industrial insurance and all other payments required under the Workmen's Compensation laws as the same become due and to furnish Oaks Construction Company with evidence that the same has been paid before final payment is made on this Subcontract.

Article XI.

That all materials delivered by or on account of the Subcontractor and intended to be incorporated into the construction hereunder shall become the property of the Owner as delivered; but the Subcontractor may repossess himself of any surplus remaining at the completion of his contract. That all scaffolding, apparatus, ways, works, machinery and plant brought upon the premises by the Subcontractor shall remain his property, but in case of default and the completion of the work by Oaks

Construction Company, the latter shall be entitled to use the said scaffolding, apparatus, ways, works, machinery and plant without cost, or liability for depreciation or damage by use and without prejudice to Oaks Construction Company's other rights or remedies for any damage or loss sustained by reason of said default.

Article XII.

This contract herein is upon a unit price, it is understood and agreed that any quantities and amounts mentioned are approximate only and may be more or less at the same unit price, and subject to change as ordered and directed by Oaks Construction Company.

Article XIII.

To indemnify and save harmless Oaks Construction Company from and against any and all suits, claims, actions, losses, costs, penalties, and damages, of whatsoever kind or nature, including attorney's fees, arising out of, in connection with, or incident to the Subcontractor's performance of this Subcontract.

Article XIV.

To immediately, after receiving written notice from the Contractor, proceed to remove or take from the grounds or buildings, all materials condemned by Oaks Construction Company, whether worked or not, as unsound or improper, or as in

any way failing to conform to the Oaks-Williams Bros. Contract, including the general or special conditions, drawings, specifications, or addenda. Failure of Oaks Construction Company to immediately condemn any work or materials as installed shall not in any way waive Oaks Construction Company's right to object thereto at any subsequent time.

Article XV.

To commence and at all times carry on, perform and complete this Subcontract to the full and complete satisfaction of Oaks Construction Company, and of the Owner. It is specifically understood and agreed that in the event Oaks Construction Company shall at any time be of the opinion that the Subcontractor is not proceeding with diligence and in such a manner as to satisfactorily complete said work within the required time, then and in that event Oaks Construction Company shall have the right, after reasonable notice of 72 hours, to take over said work and to complete the same at the cost and expense of the Subcontractor, without prejudice to Oaks Construction Company's other rights or remedies for any loss or damage sustained.

Article XVI.

Upon completion of any unit of the work, and upon final completion thereof, to clean up all refuse and rubbish around or alongside the same caused

by the Subcontractor and to promptly remove all excess material, tools, structures, etc.; which may have been brought on the premises or erected by the Subcontractor, and in the event of the failure of the Subcontractor so to do, Oaks Construction Company may so clean up the premises at the cost and expense of the Subcontractor.

Article XVI.

The Subcontractor is required to furnish Payment and Performance Bonds, each in one-half the amount of this subcontract, naming Oaks Construction Company as Principal, and shall pay all costs and premiums on such aforesaid bonds.

The Subcontractor shall carry Public Liability and Property Damage Insurance and all other insurance required by the specifications and by law, naming Oaks Construction Company as beneficiary and hereby assigns all payments from such policies to Oaks Construction Company. The Subcontractor shall furnish Oaks Construction Company with not less than three Certificates of Insurance covering Workmen's Compensation. The Subcontractor may not cancel such insurance without 10 (ten) days notice to Oaks Construction Company and to the Owner and the above-mentioned Certificates of Insurance shall so state.

Article XVIII.

The Subcontractor in performing the work required by this Subcontract, shall not discriminate

against any employee or applicant for employment because of race, creed, color, national origin, or political affiliation in the employment of persons qualified by training and experience.

Article XIX.

The Subcontractor shall comply with all existing Union Agreements applicable to his work or to that of the Contractor and Oaks Construction Company.

Article XX. Unit Price Schedule.*

1.

Appr. Quan.:

Unit: Feet.

Item: Right of Way Clear, windrow compact and/or dispose as detailed in Article XXI para. 1 and 2.

Unit Price: \$0.065.

Approx. Amount: \$31,000.00.

2.

Unit price: Six and one-half cents.

Unit: Hours.

Item: Operated Caterpillar D-8 Tractor w/dozer as detailed in Article XXI para. 4 & 3.

*[This Article is printed as corrected. Initialed C.E.O. and S.E.T.]

Unit price: \$18.00.

Approx. amount: \$900.00.

Unit price: Eighteen dollars.

Article XXI. Special Conditions.

(1) All standing trees, brush, etc., within the fifty-foot right of way are to be felled. Thirty feet of the right of way is to be completely cleared of all debris to ground level. Materials removed from this latter 30-foot width may be windrowed on 15 feet of the remaining right of way and compacted to a height not exceeding one foot or, by mutual agreement with the Oaks Construction Company and subcontractor, these materials may be buried in suitable holes, gullies, lakes, etc., on the right of way. A fire break of 25 feet in length, which is completely clear of all combustibles must extend across the right of way at intervals of 500 feet or less.

(2) Where the pipeline crosses roadways, the right of way for 300 feet on each side of the roadway center line must be completely free of all debris. All debris from this clearing must be buried in suitable holes, etc., or burned.

(3) It is anticipated that Oaks Construction Company may require the use of the Subcontractor's equipment for work not detailed above; for this work Oaks Construction Company will pay the Subcontractor the unit price per operated hour for each Caterpillar D-8 Tractor with dozer, as set

forth, in paragraph 2 of Article XX. The listed unit price for such hourly work includes dozer, operator, fuel, maintenance, and rental of equipment and shall be full and complete compensation for such work. Idle or repair time is not chargeable to Oaks Construction.

(4) It is the intent of Oaks Construction Company to pay the Subcontractor on an hourly basis for disposing of material where such material is moved in excess of 100 feet, except as provided in paragraphs 1 and 2 above. Hourly payment shall be made only for the actual time involved in transporting the material and shall not include any other time, nor costs to Oaks Construction Company.

(5) All work detailed in paragraphs 3 and 4 will be authorized by purchase orders issued and signed by the Contractor's job representative which detail the area and equipment hours used. No payment will be made for work not authorized by a purchase order issued to the Subcontractor.

(6) The location of the work is on the right of way of the Products Pipeline System between Station 1937/38.0 PI near Buffalo Lodge and Station 567/31 PI about Mile 1325.4 Alaska Highway.

(7) Special Conditions applicable to: None.

Article XXII. Method of Measurement.

See 1-22 of the Specifications.

The hours of rented equipment paid the subcontractor shall be the total hours worked which have

been approved on purchase order forms as set forth in Article XXI, Paragraph 5 of this Subcontract.

Article XXIII. Payment.

Payment shall be at the rates as hereinbefore set forth. Ten per cent of all partial payments due the Subcontractor shall be retained by Oaks Construction Company.

Final payment for the work covered by this Subcontract shall be made only after acceptance of the work by the Owner and payment therefore having been received by Oaks Construction Company.

Witness our hands and seals as of the day and seals as of the day and year herein first above written.

OAKS CONSTRUCTION
COMPANY,

By /s/ CARL E. OAKS.

Witnesseth:

STUART CONSTRUCTION
CO., INC.,

By /s/ STUART E. TOPE,
Subcontractor.

Witness:

/s/ KENNETH I. JOHNSON,

/s/ OLIN A. DWYER.

[Endorsed]: Filed February 10, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants, Carl E. Oaks, J. Butcher and J. E. Noonan, d/b/a Oaks Construction Company, through their attorney, John C. Dunn, and move the Court in the manner following:

(a) To dismiss the complaint against these moving defendants with respect to both causes of action therein stated on the ground that the contract on which this complaint is based has been assigned by plaintiffs Stuart Construction Co., Inc., and that neither of the plaintiffs, therefor, is the real party in interest to prosecute this action.

(b) To dismiss the complaint with respect to plaintiff Stuart E. Tope and with respect to both causes of action therein stated on the ground that, as appears from said complaint and the exhibit attached thereto, plaintiff Stuart E. Tope is not a party to the contract on which this action is based.

(c) To dismiss the complaint against these moving defendants with respect to both causes of action therein stated for the reason that no notice was given as required by Section 270 B of Title 40, United States Code Annotated, on which Section this action is based.

(d) To grant these moving defendants judg-

ment against plaintiffs for their costs and disbursements herein, including a reasonable attorney's fee.

/s/ JOHN C. DUNN,
Attorney for Cal E. Oaks, J. Butcher and J. E.
Noonan, d/b/a Oaks Construction Co.

Service of copy acknowledged.

[Endorsed]: Filed April 19, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants, Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., through their attorney, John C. Dunn, and move the Court as follows:

(1) To dismiss the complaint herein filed, as against them, with respect to both causes of action therein stated, on the ground that, as appears from the complaint and the exhibit attached thereto, there is no privity of contract between either of plaintiffs and one or more of these moving defendants.

(2) To dismiss the complaint herein filed with respect to plaintiff Stuart E. Tope, against these moving defendants and with respect to both causes of action set forth in said complaint, on the ground that, as appears from the complaint and the exhibit

attached thereto, plaintiff Stuart E. Tope is not a party to the contract on which this action is based.

(3) To dismiss the complaint, against these moving defendants and with respect to both causes of action therein stated, on the ground that plaintiff Stuart Construction Co., Inc., has assigned the contract on which this action is based and, therefore, neither of plaintiffs is the real party in interest in this action;

(4) To dismiss this complaint against these moving defendants with respect to both causes of action therein stated on the ground that neither of plaintiffs gave the notice required to be given by Section 270B of Title 40, United States Code Annotated, upon which Section this cause of action is based.

(5) To grant these moving defendants judgment against both plaintiffs for their costs and disbursements herein, including a reasonable attorney's fee.

/s/ JOHN C. DUNN,
Attorney for Defendants Williams Brothers Company; McLaughlin, Inc., and Marwell Construction Company, Ltd.

Service of copy acknowledged.

[Endorsed]: Filed April 19, 1955.

[Title of District Court and Cause.]

M. O. RENDERING ORAL DECISION

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now at this time, arguments having heretofore and on the 17th day of June, 1955, been had in cause No. A-10,656, entitled United States of America, for the use and benefit of Stuart Construction Co., Inc., a corporation, and Stuart E. Tope, an individual, plaintiffs, versus Carl E. Oaks, J. Butcher and J. E. Noonan, d/b/a Oaks Construction Company, Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., defendants, and the Court having reserved its decision,

Whereupon, Court now renders its oral decision, and now denies motion to dismiss, and defendants given ten (10) days within which to answer.

Entered October 10, 1955.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Come now the defendants, through their attorney, John C. Dunn, and answer the complaint of plaintiffs herein in the manner following:

First Cause of Action

I.

Defendants deny that plaintiff Stuart Construction Co., Inc., is a corporation that has complied with all Territorial requirements precedent to bringing this suit.

II.

Defendants deny that Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., entered into a subcontract with Williams-McLaughlin for a portion of the construction of the pipeline mentioned in paragraph I of plaintiffs' first cause of action.

III.

Defendants admit that on or about December 15, 1953, Oaks Construction Company entered into a subcontract with Williams Brothers Company for work on the pipeline mentioned in paragraph I of plaintiffs' first cause of action.

IV.

Defendants admit that, on or about December 17, 1953, defendant Oaks Construction Company entered into a contract with Plaintiff Stuart Construction Co., Inc., as evidenced by Exhibit "A" attached to the complaint filed herein.

V.

Defendants deny that defendant companies were bonded as provided by Title 40, United States Code, Section 270 a.

VI.

Defendants deny that this cause of action is brought under the provisions of Title 40, United States Code, Section 270 b.

VII.

Defendants lack information sufficient to form a belief as to the truth or falsity of the remainder of the allegations contained in paragraph I of plaintiffs' first cause of action and, therefore, deny the same.

VIII.

Defendants deny each and every allegation contained in Paragraph II of plaintiffs' first cause of action.

And, by way of answer to plaintiffs' second and alternative cause of action, defendants say as follows:

I.

Defendants deny each and every allegation contained in paragraph I in plaintiffs' second and alternative cause of action.

By way of special defense to both causes of action alleged by plaintiffs, defendants allege the following:

I.

That no privity of contract exists with respect to any party hereto other than between plaintiff Stuart Construction Co., Inc., and Oaks Construction Company.

II.

That plaintiffs herein, and neither of them, is the real party in interest herein.

III.

That this action has been begun without proper authority or power with respect to plaintiff Stuart Construction Co., Inc.

IV.

That plaintiffs, and neither of them, have given the notice required by Section 270 b of Title 40 of the United States Code Annotated with respect to a person or legal entity having no contractual relationship, express or implied, with the contractor furnishing the payment bond mentioned in said section 270 b.

Having answered the causes of action set forth in the complaint filed herein, come now the defendants Carl E. Oaks, J. Butcher, and J. E. Noonan, doing business as Oaks Construction Company, and by way of counterclaim against plaintiffs, jointly and severally, allege as follows:

I.

Carl E. Oaks, Owen J. Butcher and J. E. Noonan, were at all times complained of herein, co-partners doing business as Oaks Construction Company.

II.

Plaintiff Stuart Construction Co., Inc., purports to be a corporation organized and existing under

the laws of the Territory of Alaska; however, defendants believe and, therefore, allege that plaintiff Stuart E. Tope and Stuart Construction Co., Inc., are one and the same legal entity.

III.

On or about December 17, 1953, defendants entered into the subcontract which is attached to the complaint filed herein as Exhibit "A."

IV.

Plaintiffs failed to perform the work required by said contract, defaulted thereunder, neglected and refused to furnish bond and insurance and both as called for therein, and violated practically every provision of said contract by plaintiffs to be performed.

V.

Insofar as plaintiffs did perform under said contract of December 17, 1953, the work performed was not according to prescribed standards and specifications, was unworkmanlike, and faulty.

VI.

Plaintiffs completed approximately only one-third of the work called for by said contract of December 17, 1953.

VII.

The value of the work performed by plaintiffs under said contract of December 17, 1953, is not more than \$33,335.47.

VIII.

Defendants have made payroll advances and paid invoices and various bills incurred by plaintiffs under said contract of December 17, 1953, to the extent of \$71,416.29, such being done at the instance and request of plaintiffs.

IX.

There is now due and owing to defendants from plaintiffs under said contract of December 17, 1953, the sum of \$38,080.82, and, although defendants have demanded payment of the same, plaintiffs refuse to pay any part thereof.

X.

In addition to said sum of \$38,080.82, plaintiffs have pledged the credit of defendants and have done acts and permitted acts to be done which have resulted in indebtedness, which, unless paid for by defendants, will result in lienable items and claims against payment and performance bonds which will ultimately have to be paid by defendants, all to the sums of not less than \$6,000.00. Such acts of plaintiffs were wholly unauthorized by defendants, or any of them, and wholly unjustified.

XI.

As a result of plaintiffs' unauthorized and deliberate pledging of the credit of defendants, defendants have been subjected to actions at law which defendants have to defend at their own ex-

pense, all to the damage of the defendants of not less than \$3,000.00.

XII.

By the unauthorized, unjustified and deliberate pledging of defendants' credit, by plaintiffs, plaintiffs have wilfully and maliciously subjected defendants to unnecessary expense and have injured, maligned and jeopardized the credit rating and business reputation of defendants so that defendants are entitled to punitive damages against plaintiffs in the amount of not less than \$25,000.00.

XIII.

As a result of plaintiffs' failure to perform said contract of December 17, 1953, and of plaintiffs' pledging, unauthorizedly, the credit of defendants as aforesaid, damaging defendants' reputation for good credit, and damaging defendants' business reputation, defendants were unable to complete the work defendants had contracted to complete; a part of which was sub-let to plaintiffs under said contract of December 17, 1953, at a profit. The total amount so lost by defendants is now the subject of an audit and is not available to defendants at this time; however, such loss resulted from the wrongful acts of plaintiffs; and defendants are entitled to be reimbursed therefor by plaintiffs at such time as the sum becomes known.

Wherefore, defendants pray that plaintiffs take nothing by virtue of their complaint filed herein and that defendants be allowed their costs and dis-

bursements herein, including a reasonable attorney's fee;

And defendants Carl E. Oaks, Owen J. Butcher and J. E. Noonan further pray for a judgment against plaintiffs, jointly and severally, in the amount of \$72,080.82, plus interest thereon as allowed by law; and for the further sum hereafter computed by audit which constitutes a loss to defendants on the work contracted to be done by them; a part of which was sub-let by them to plaintiffs; for their costs and disbursements herein, including a reasonable attorney's fee; and for such other and further relief as the Court may deem just in the premises.

/s/ JOHN C. DUNN,

Atty. for Defendants.

Duly verified.

Service of copy acknowledged.

[Endorsed]: Filed October 27, 1955.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Plaintiffs reply to the Counterclaim of the defendants, Carl E. Oaks, J. Butcher and J. E. Noonan and say:

I.

Admit the allegations contained in Paragraph I.

II.

Deny the allegations contained in Paragraph II.

III.

Admit the allegations contained in Paragraph III.

IV.

Deny the allegations contained in Paragraphs IV through XIII.

Wherefore, Plaintiffs pray for judgment as requested in their complaint.

BUELL A. NESBETT,

By /s/ BUELL A. NESBETT,
Attorney for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed December 8, 1956.

[Title of District Court and Cause.]

MEMORANDUM OPINION ON MERITS
OF CASE

Attorney for Plaintiffs:

BUELL A. NESBETT, ESQ.

Attorney for Defendants:

JOHN C. DUNN, ESQ.

This action purports to have been brought under the provisions of Section 270b, Title 40, U.S.C.A. The said section and the preceding one specifically provide for the protection of subcontractors and others in performing duties in connection with United States public works. For instance, it is specifically provided by Section 270a of said Title 40, U.S.C.A., that a contractor, in contracting with the Government in connection with public works, shall provide a bond for the protection of all persons who have had occasion to perform services or to furnish equipment in connection with said public works. Such bond is designated as a performance bond.

By Section 270b, *supra*, it is provided that:

“Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor * * * shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sums or sums justly due him: * * *” (Emphasis mine.)

It is further provided that any person having a direct relationship with the subcontractor and none with the main contractor can only sue after notice to the main contractor.

It is further provided that suits on the performance bond shall be brought in the name of the United States, etc.

In this case the bonding company was not made a party. The suit proceeds against the original contractors and a subcontractor. Since the action does not conform to the statute, it is not an action under said section 270b. Moreover, the original contractors, having had no privity of contract with the plaintiff, should be, and the same are eliminated from this proceeding.

It further appeared from the evidence that the Oaks Construction Company was a partnership composed of Carl E. Oaks, J. Butcher and J. E. Noonan, and that the last two named partners have deceased, and that no suggestion of death has been made so that the action might proceed in the name of personal representatives. Accordingly, the only defendant remaining in the case is Carl E. Oaks. There are two plaintiffs, Stuart Construction Co., Inc., and Stuart E. Tope. And the evidence disclosed that, whereas the Stuart Construction Co., Inc., had a contract with the Oaks Construction Company dated December 17, 1953, yet said corporate plaintiff, upon all the evidence, performed no service and was without equipment to carry out the contract executed as above stated. There was no pretense that the contract with Stuart Construction Company was ever observed or carried out. The corporate entity (like Banquo's ghost in Macbeth) would not down and constantly appeared, not

as a terrifying phantom but as a confusing one. The meaning of this is, that the only parties to this action who deserve comment and invoke decision in the controversy are Stuart E. Tope and Carl E. Oaks, the latter doing business as Oaks Construction Company.

It appeared from the testimony that the personal plaintiff, Stuart E. Tope, incorporated the Stuart Construction Co., Inc., in the year 1952. In a way, he did business in the name of this corporate entity. When the contract of December 17, 1953, was executed, Stuart Construction Co., Inc., had no equipment and was practically without funds. The contract of said date required the performance of conditions precedent before said contract would become effective. Not one of these conditions was observed or carried out. The personal defendant, however, did own equipment, and placed it on the construction job. It should be stated here, that the contract with the Government involved the clearing of a right of way for Pipeline Products System extending 600 miles from Haines to Fairbanks, Alaska. The so-called subcontract with Stuart Construction Co., Inc., covered a segment of approximately 100 miles. Upon this segment the personal plaintiff, with his equipment consisting of three Caterpillars, one 2½ ton Dodge Truck, one Ford Station Wagon, and one G. M. C. ½ ton Pickup Truck, went on the job. The personal plaintiff was paid \$250.00 per week for his services, but nothing was said or arranged about compensation

for the use of his equipment. However, it was used by the defendant, purportedly upon the approximately 100 miles covered by the subcontract with Stuart Construction Co., Inc.

While the defendant used the personal plaintiff's equipment and exercised complete control over it, yet, throughout the construction work, the plaintiff and his equipment were treated as operating under the subcontract of December 17, 1953. The defendant elected to declare a default under said contract and made claims against the Stuart Construction Co., Inc., upon the theory that it had failed to perform the service or to observe the conditions precedent named in the contract. The corporate plaintiff brought suit on one count upon the contract, and the personal plaintiff brought suit in the same action on another count for the equipment used by the defendant on the job.

The evidence disclosed that the personal plaintiff was the owner of all the equipment furnished and used by the defendant. His ownership, however, was based upon a "Rental Agreement With Option to Purchase" from Northern Commercial Company of Fairbanks, Alaska. Because of this arrangement, on December 2, 1953, before execution of the above-named subcontract, Stuart Construction Co., Inc., made an assignment to Northern Commercial Company of:

"* * * all sums of money now due or to become due us from Oaks Construction Co. for

any and all accounts including, but not limited to, earnings to become due under pipeline clearing contract and/or snow clearing.”

This was signed by the Stuart Construction Co., Inc., and accepted by Oaks Construction Co., through Carl E. Oaks.

It is not disputed that the equipment of the personal plaintiff was used by Oaks Construction Company. For instance, the 2½ ton Dodge Truck was used three months and three weeks; the Ford Station Wagon was used three months and three weeks; the GMC Pickup ½ ton was used three months and three weeks, and the three Caterpillars, according to the data furnished by the defendant, were used 723½ hours. The Caterpillars were used in rough terrain, over the protest of the personal plaintiff, and the result was that the machinery was broken and disabled, and, much of the time being out of repair, was not suitable for use.

The evidence was that the naked rental of such machinery would run from \$20.00 to \$35.00 per hour. And the evidence indicated that the reasonable rental on the 2½ ton Dodge Truck would be \$800.00 per month; the Ford Station Wagon, \$250.00 per month, the GMC Pickup Truck, \$250.00 per month.

Pursuant to the assignment to the Northern Commercial Company, the defendant compromised the rentals on the personal plaintiff's equipment due

to the Northern Commercial Company, and paid the sum of \$5,332.50.

It would follow that the personal plaintiff would be entitled to judgment against the defendant for the use of his equipment less the amount paid to the Northern Commercial Company.

1. While the personal plaintiff claimed rental on all of his equipment during the entire period of construction work, yet there was no express contract to pay a rental on said equipment.

The defendant admits that the three Caterpillars were used a total of 723½ hours. Since this equipment suffered rough treatment and severe use by the defendant, the machinery being disabled and requiring repair, the personal plaintiff should be allowed the maximum naked rental of \$35.00 per hour.

The testimony showed that a reasonable rental for the use of said machinery under such circumstances would run as high as \$35.00 per hour. Computing a rental charge at this rate would show a rental of \$25,322.50. From this, deducting the amount paid to Northern Commercial Company of \$5,332.50, would leave a balance of \$19,990.00.

2. The evidence showed that the Dodge Truck, the Station Wagon, and the Pickup Truck would carry a reasonable rental of \$4,870.00, which, added to the rental on the Caterpillars of \$19,990.00,

would aggregate \$24,860.00. And the plaintiff is entitled to judgment for this amount,

Counsel for plaintiff will prepare and submit appropriate Findings of Fact and Declarations of Law, together with a proposed Judgment.

Kansas City, Missouri, October 9, 1958.

/s/ ALBERT L. REEVES,
Visiting Judge.

[Endorsed]: Filed October 13, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on regularly for hearing before the Honorable Albert L. Reeves, Federal District Judge, sitting as a visiting judge, on August 11, 1958, the plaintiff, Stuart E. Tope being personally present in court and represented by his attorney, Buell A. Nesbett, and the defendant Carl E. Oaks being personally present and all of the defendants being represented by their attorney, John C. Dunn. Evidence, both oral and documentary, was introduced by both sides and hearing concluded on the 15th day of August, 1958. The matter was taken under advisement by the Court. From the Memorandum Opinion on Merits of Case rendered by the Court on October 9, 1958, the following Findings of Fact and Conclusions of Law are derived.

Findings of Fact

I.

That there was no direct relationship or privity of contract between either of the plaintiffs and the defendant Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd.

II.

That the defendants J. Butcher and J. E. Noonan died after the commencement of this action and their personal representatives have not been joined as parties defendant.

III.

That the contract between Stuart Construction Co., Inc., and Oaks Construction Co. was never observed or carried out, certain conditions precedent were not performed and Stuart Construction Co., Inc., as a corporation performed no services, owned no equipment and in fact did not function as a corporate entity insofar as the issues in this case are concerned.

IV.

That the personal plaintiff, Stuart E. Tope, owned certain equipment consisting of three caterpillar tractors one 2½ ton Dodge truck, one Ford station wagon and one GMC ½-ton pickup truck which he was purchasing from the Northern Commercial Company of Fairbanks under a rental agreement with option to purchase.

V.

That the defendant Oaks Construction Company

exercised complete control over and used the equipment mentioned in paragraph IV in the clearing of approximately 100 miles of a 600-mile right-of-way for the construction of an oil pipeline for the United States Government between Haines and Fairbanks, Alaska.

VI.

That no definite agreement had been reached between the personal plaintiff Stuart E. Tope and Oaks Construction Co. as to compensation to that plaintiff for the use of the equipment.

VII.

That the defendant Oaks Construction Co. used the caterpillar tractors a total 723½ hours; the 2½-ton Dodge truck for 3 months and 3 weeks; the Ford station wagon for 3 months and 3 weeks and the GMC ½-ton pickup truck for 3 months and 3 weeks.

VIII.

That the reasonable hourly rental rate for the caterpillar tractors under the circumstances of their use was \$35.00 per hour; that the reasonable monthly rental rate for the 2½-ton Dodge truck was \$800.00 per month; that the reasonable monthly rental rate for the Ford station wagon was \$250.00 per month and that the reasonable monthly rental rate for the GMC ½-ton pickup truck was \$250.00 per month.

IX.

That the Northern Commercial Company of Fairbanks, Alaska, attempted to compromise with Carl

E. Oaks d/b/a Oaks Construction Co. the amount of equipment rental due the personal plaintiff Stuart E. Tope from that defendant and actually paid to Northern Commercial Company the sum of \$5,332.50 which payment accrued to the personal plaintiff Stuart E. Tope's benefit and should therefore be deducted from any recovery awarded that plaintiff.

Conclusions of Law

From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

1. That the defendants J. Butcher, J. E. Noonan and Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., are eliminated as defendants in this action.

2. That the written contract between Stuart Construction Co., Inc., and Oaks Construction Co. is a legal nullity.

3. That Stuart Construction Co., Inc., as a corporate entity is not properly a party to this case.

4. That the personal plaintiff Stuart E. Tope and the defendant Carl E. Oaks, d/b/a Oaks Construction Co. are the only proper parties.

5. That the personal plaintiff Stuart E. Tope should recover judgment against Carl E. Oaks d/b/a Oaks Construction Company in the sum of \$4,870.00, the reasonable rental value of the 2½ ton Dodge truck, Ford station wagon and GMC ½ ton pickup truck, and in the sum of \$25,322.50 as the reason-

able rental value of the caterpillar tractors; that from the total of the above sums should be deducted the sum of \$5,332.50 paid by Oaks Construction Co. to Northern Commercial Company of Fairbanks, Alaska, which said payment accrued to the benefit of the personal plaintiff Stuart E. Tope.

6. That the personal plaintiff Stuart E. Tope is entitled to interest on the judgment at the rate 6% per annum from August 15, 1954.

7. That the defendant Carl E. Oaks d/b/a Oaks Construction Co. shall recover nothing on the counterclaim.

8. That the plaintiff Stuart E. Tope is entitled to his costs and disbursements as taxed by the Clerk of the Court plus an attorney's fee computed on the basis of Rule 25, Amended Uniform Rules of the District Court for the District of Alaska for a contested case.

Dated at Kansas City, Missouri, 23rd day of October, 1958.

/s/ ALBERT L. REEVES,
Visiting District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 7, 1958.

In the District Court for the District of Alaska,
Third Division

A-10,656

UNITED STATES OF AMERICA, for the Use
and Benefit of Stuart Construction Co., Inc., a
Corporation, and STUART E. TOPE, an In-
dividual,

Plaintiffs,

vs.

CARL E. OAKS, J. BUTCHER and J. E.
NOONAN, d/b/a OAKS CONSTRUCTION
COMPANY, WILLIAMS BROTHERS COM-
PANY, McLAUGHLIN, INC., and MAR-
WELL CONSTRUCTION COMPANY, LTD.,

Defendants.

JUDGMENT

Trial of this case in Anchorage, Alaska, before the Honorable Albert L. Reeves, Federal District Judge, commenced on August 11, 1958, and was completed on August 15, 1958. The plaintiff Stuart E. Tope was personally present in court and represented by his attorney, Buell A. Nesbett, and the defendant Carl E. Oaks was personally present in court and all of the defendants were represented at the trial by their attorney, John C. Dunn. Evidence both oral and documentary was introduced by both sides and the Court rendered its Memorandum Opinion on Merits of Case on October 9, 1958. Find-

ings of Fact and Conclusions of Law having been duly entered,

It is hereby adjudged and decreed:

1. That the action be dismissed as to the plaintiff, Stuart Construction Company, Inc., and as to the defendants J. Butcher, J. E. Noonan and Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd.

2. That the counterclaim of the defendants be dismissed.

3. That the plaintiff Stuart E. Tope, individually have judgment against the defendant Carl E. Oaks d/b/a Oaks Construction Company in the sum of \$24,860.00 plus interest from the 15th day of August, 1954, at the rate of 6% per annum.

4. That the plaintiff Stuart E. Tope have his costs and disbursements as taxed by the Clerk of this Court and an attorney's fee computed on the basis of Rule 25, Amended Uniform Rules of the District Court for the District of Alaska, for a non-lien contested case.

Dated at Kansas City, Missouri, this 23rd day of October, 1958.

/s/ ALBERT L. REEVES,
Visiting Judge.

Service of copy acknowledged.

[Endorsed]: Filed and entered November 7, 1958.

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS, MAKE
ADDITIONAL FINDINGS, AND AMEND
JUDGMENT ACCORDINGLY.

Come now the defendants and move the Court to amend its Findings of Fact and Conclusions of Law heretofore made herein, make additional Findings of Fact and Conclusions of Law, and amend the Judgment heretofore entered herein accordingly.

This motion is in two parts. The first part deals with findings in the event this Court determines ultimate liability as currently set forth in the judgment dated October 23, 1958, and heretofore entered herein on November 7, 1958.

The second part is concerned with findings in the event this Court determines ultimate liability of a nature other than that set forth in the judgment of November 7, 1958.

Part One

In the event this Court ultimately determines liability to be of the nature of that set forth in the judgment heretofore entered on November 7, 1958, defendants move this Court to amend the judgment of November 7, 1958, so as to conform to amended and additional findings and conclusions, which are hereby requested, of the nature following:

Findings of Fact

I.

Williams Bros. Co., McLaughlin, Inc., and Marwell Construction Co., Ltd., are corporations which

formed a joint venture known as Williams, McLaughlin and Marwell, which joint venture obtained a contract from the government of the United States of America to construct approximately six hundred miles of pipeline between Haines, Alaska, and Fairbanks, Alaska.

II.

Oaks Construction Co. was a partnership consisting of Carl E. Oaks, J. Butcher, and J. E. Noonan; however, during the pendency of this action, J. Butcher and J. E. Noonan died. The personal representatives of neither of the deceased partners were ever substituted as parties defendant herein.

III.

Oaks Construction Co. obtained a subcontract from Williams, McLaughlin and Marwell to clear and grade the six hundred miles of pipeline right of way.

IV.

This action is concerned with the work of clearing the right of way on approximately a one hundred mile section of said pipeline lying between Big Delta, Alaska, and Tok Junction, Alaska.

V.

Under date of December 17, 1953, Oaks Construction Co., over the signature of Carl E. Oaks, entered into a subcontract with Stuart Construction Co., Inc., over the signature of Stuart E. Tope by the terms of which Stuart Construction Co., Inc., was to furnish all materials, supplies and equipment and perform all labor required to clear said one hundred

miles of right of way in accordance with provisions of the prime contract and the plans and specifications governing the same. Said work was to be completed with 120 calendar days and was to be paid for at the rate of 6½¢ per lineal foot. Said subcontract also provided a rental of \$18.00 an hour for D-8 caterpillar tractors, manned and operated, for work required beyond the scope of said subcontract. The subcontract of December 17, 1953, required Stuart Construction Co., Inc., to furnish a payment and performance bond.

VI.

This cause of action proceeded on two counts. The first count sought recovery by Stuart Construction Co., Inc., on the subcontract of December 17, 1953, against all defendants and purported to be brought under the Miller Act (Title 40, USCA, Sec. 270-A). The second and alternative count was brought in the name of Stuart E. Tope and sought recovery against Oaks Construction Co. on the basis of equipment furnished and services rendered in connection with clearing right of way.

VII.

Both counts of the complaint sought recovery of the same amount of money and were based upon rental of a 2½ ton Dodge truck at the rate of \$800.00 a month for three months and three weeks, a Ford station wagon at \$250.00 a month for three months and three weeks, a ½ ton GMC pickup truck at \$250.00 a month for three months and three

weeks, and caterpillar tractor time at the rate of \$25.00 an hour, all for a total of \$53,620.00.

VIII.

Both plaintiffs agreed that an off-set against caterpillar rental for operating costs should be allowed in the amount of \$16,698.00.

IX.

Neither plaintiff gave any notice of this claim to the prime contractor, Williams, McLaughlin and Marwell.

X.

This action was not brought in the name of the United States of America.

XI.

The company bonding of the prime contractor, Williams, McLaughlin and Marwell, was not made a party to this action.

XII.

Under date of December 2, 1953, an assignment running to the Northern Commercial Co. of Fairbanks, Alaska, and accepted by Oaks Construction Co. was executed by Stuart Construction Co., Inc., over the signature of Stuart E. Tope as president. Said instrument read in part, "We hereby assign * * * all sums of money now due or to become due to us from Oaks Construction Co. for any and all accounts including, but not limited to, earnings to become due under pipeline clearing contract and/or snow clearing."

XIII.

Stuart E. Tope incorporated Stuart Construction Co., Inc., in 1952. The sole stockholders of Stuart Construction Co., Inc., and the only ones there have ever been, are Stuart E. Tope, his wife and his brother-in-law. The personal activities of Stuart E. Tope were confusingly intermingled with the corporate activities of Stuart Construction Co., Inc. Stuart E. Tope conducted his personal business in the name of Stuart Construction Co., Inc.

XIV.

Throughout the work called for by the subcontract of December 17, 1953, Stuart Construction Co., Inc., owned no equipment, performed no service, and was practically without funds.

XV.

From sometime in December of 1953 until sometime in April of 1954, Stuart E. Tope was paid a salary for services rendered in connection with the work covered by said subcontract of December 17, 1953, at \$250.00 a week.

XVI.

Stuart E. Tope had possession of caterpillar tractors, a Dodge truck, a Ford station wagon, and a GMC pickup truck which were used in the course of performing the work called for by said subcontract of December 17, 1953. The two trucks and the station wagon were used for a period of three months and three weeks, each, and the caterpillar tractors were used 723½ hours.

XVII.

These caterpillar tractors, trucks and station wagon were owned by the Northern Commercial Co. of Fairbanks and possessed by Stuart E. Tope under rental agreements with option to purchase. Stuart E. Tope never exercised the option to purchase, and all this equipment was subsequently repossessed by the Northern Commercial Co.

XVIII.

No bond was ever furnished as called for by said subcontract of December 17, 1953, but Stuart E. Tope attempted to get such a bond both before and after the execution of said subcontract of December 17, 1953.

XIX.

Between December 1 and December 15, 1953, defendant Carl E. Oaks told Stuart E. Tope to forget about obtaining a bond and that they would work something out on an hourly basis of rental for equipment used by Oaks Construction Co.

XX.

Under date of February 6, 1954, Stuart Construction Co., Inc., made a request for a progress payment on a footage basis for the period ending January 29, 1954. This request was over the signature of Stuart E. Tope.

XXI.

Throughout the work called for by said subcontract of December 17, 1953, Oaks Construction Co. proceeded under the theory that the work was being done under said subcontract, furnished Stuart Con-

struction Co., Inc., by delivery to Stuart E. Tope, a weekly payroll report showing monies paid employees performing the work called for by said subcontract of December 17, 1953, and charged against the earnings under said subcontract, and furnished Stuart Construction Co., Inc., by delivery to Stuart E. Tope, a monthly statement of all charges made against the earnings under said subcontract of December 17, 1953. No objection was ever made to any of said charges; however, Oaks Construction Co. exercised complete control over the caterpillars, trucks, and Ford station wagon possessed by Stuart E. Tope and, generally, exercised complete control over and conducted the work called for by said subcontract of December 17, 1953. The business records kept by Stuart Construction Co., Inc., were incomplete and irregular.

XXII.

The complaint herein was filed February 10, 1955; however, annual corporation taxes due the Territory of Alaska from plaintiff corporation on January 1, 1958, were not paid until May 23, 1958. The annual report of Stuart Construction Co., Inc., for the year ending September 30, 1955, and due December 1, 1955, was not filed until December 10, 1956; and annual reports for the years ending September 30, 1956, and September 30, 1957, and due December 1, 1956, and December 1, 1957, were not filed until August 13, 1958.

XXIII.

On August 15, 1954, Carl E. Oaks refused to meet

Stuart E. Tope in the offices of the Northern Commercial Co. in Fairbanks.

XXIV.

On October 4, 1954, in order to prevent the Northern Commercial Co. of Fairbanks from again tying up the funds due Oaks Construction Co., as the N. C. Co. had previously done, from Williams, McLaughlin and Marwell, as a result of monies owed N. C. Co. for the caterpillars, trucks and station wagon in the possession of Stuart E. Tope and used in the course of the work called for by said subcontract of December 17, 1953, Oaks Construction Co. made a settlement with N. C. Co. whereby Oaks Construction Co. agreed to pay the N. C. Co. the total sum of \$10,798.47 to apply against the account of N. C. Co. carried against Stuart E. Tope. This settlement was made up of two items. One item was the sum of \$5,332.50 which was one-half the rental due N. C. Co. for the three caterpillar tractors and the Dodge truck possessed by Stuart E. Tope under rental-purchase agreement. The remaining sum of \$5,465.97 was the full open account, being monies due for parts purchased for the above-described equipment, due N. C. Co. as of June 15, 1953, on the account carried in the name of Stuart E. Tope.

XXV.

Oaks Construction Co. paid the Northern Commercial Co. the \$5,332.50.

XXVI.

Subsequently, Oaks Construction Co., Inc., paid the balance of this settlement figure of \$5,465.97.

XXVII.

As a result of this settlement, monies due N. C. Co. under this account were reduced \$10,798.47.

XXVIII.

The evidence concerning a fair rental value for the caterpillar tractors varied from \$18.00 an hour, operated, manned and maintained, to \$35.00 an hour with the lessee bearing the cost of maintenance and furnishing an operator. Likewise, testimony concerning a reasonable rental of the Dodge truck varied from \$300.00 to \$800.00 a month, for the station wagon from \$150.00 to \$250.00 a month, and for the GMC pickup truck from \$130.00 to \$250.00 a month.

XXIX.

The equipment possessed by Stuart E. Tope under the rental-purchase agreement with Northern Commercial Co. was all used equipment in condition good enough for summer operation but not able to withstand the extreme cold temperatures of a winter operation in the area of the work called for by the subcontract of December 17, 1953.

XXX.

Oaks Construction Co. proceeded under the theory that said subcontract of December 17, 1953, was operative, kept records of the cost of completing the work called for by said subcontract, declared said subcontract in default, and cross-claimed against plaintiffs for \$37,498.64, being the difference between the actual cost of completing the work called for by said subcontract, namely, the sum of

\$70,834.11, and that which would have been earned under said subcontract according to its payments schedule, namely, the sum of \$33,335.47.

XXXI.

In connection with the work called for by said subcontract of December 17, 1953, Stuart E. Tope, in the name of Stuart Construction Co., Inc., incurred indebtednesses and pledged the credit of Oaks Construction Co. for which sums Oaks Construction Co. is responsible under the bond it gave Williams, McLaughlin and Marwell, in the total amount of \$5,247.01, for which sum Oaks Construction Co. sought recovery against plaintiffs by way of counterclaim.

XXXII.

Also as a result of the pledging of the credit of Oaks Construction Co. by Stuart E. Tope and in the name of Stuart Construction Co., Inc., Oaks Construction Co. is currently defending two actions at law in Fairbanks, Alaska, for the expenses and damages of which Oaks Construction Co. counterclaimed against plaintiff in the amount of \$3,000.00.

XXXIII.

Oaks Construction Co. also sought punitive damages against plaintiffs by way of counterclaim for their unauthorized pledging the credit and damaging the credit rating and business reputation of Oaks Construction Co.

XXXIV.

Oaks Construction Co. also counterclaimed against

plaintiffs for damages resulting from Oaks Construction Co., as a result of the activities of plaintiffs, being unable to complete the work Oaks Construction Co. contracted to do on said pipeline under subcontract with Williams, McLaughlin and Marwell. However, this work has never been subjected to final audit by Oaks Construction Co.; and Oaks Construction Co. abandoned this part of its counterclaim.

Conclusions of Law

Based on the foregoing findings of fact, the Court makes the following conclusions of law:

I.

The statutory requirements of basing an action under the Miller Act (Title 40, USCA, Sec. 270) were not met, and no recovery can be had under the provisions of said act.

II.

No privity of contract exists between either plaintiff and one or more of the following, namely: Williams Bros. Co., McLaughlin, Inc., and Marwell Construction Co., Ltd.

III.

The subcontract of December 17, 1953, was void ab initio.

or

The furnishing of a bond, the acquiring of equipment and operating capital by Stuart Construction Co., Inc., were conditions precedent to the sub-

contract of December 17, 1953, becoming effective; and said subcontract remained a nullity, because these conditions were not fulfilled.

or

There was a binding oral agreement between Stuart E. Tope and Oaks Construction Co. to waive the requirement of a bond, rescind the subcontract of December 17, 1953, and pay Stuart E. Tope for caterpillar tractors, trucks and station wagon on a rental basis.

IV.

Stuart Construction Co., Inc., and Stuart E. Tope are separate and distinct legal entities.

V.

The sole parties in interest herein are Stuart E. Tope and Carl E. Oaks.

VI.

Stuart Construction Co., Inc., is entitled to no recovery herein.

VII.

No one or more of the defendants named herein is entitled to recovery against Stuart Construction Co., Inc., for costs or attorney's fees on the first count of the complaint.

VIII.

Stuart E. Tope is entitled to recover a reasonable value for the use of his equipment on the basis of quantum meruit from Carl E. Oaks.

IX.

The death of two of the partners of Oaks Construction Co. during the pendency of this action does not affect the right of Stuart E. Tope to recover judgment against Carl E. Oaks.

X.

A reasonable rental rate and the amount for which Stuart E. Tope is entitled are as follows:

A.	Caterpillar tractors for 723½ hours at the rate of \$18.00 per hour, totalling	\$13,023.00
B.	Dodge truck for three months and three weeks at the rate of \$300.00, totalling	975.00
C.	Ford station wagon for three months and three weeks at the rate of \$150.00, totalling	487.50
D.	GMC pickup truck for three months and three weeks at the rate of \$130.00, totalling	422.50
Total		<hr/> \$14,908.00

XI.

There should be allowed an off-set against this sum in the amount of \$10,798.47 for monies paid the Northern Commercial Co. of Fairbanks under the settlement concerned with Stuart E. Tope, leaving a net of \$4,109.53, in which amount Stuart E. Tope is entitled to judgment against Carl E. Oaks.

or

There should be allowed an off-set against this sum in the amount of \$5,332.50 for monies paid the Northern Commercial Co. of Fairbanks under the settlement concerned with Stuart E. Tope, leaving a net of \$9,575.50, in which amount Stuart E. Tope is entitled to judgment against Carl E. Oaks. No off-set should be allowed for the sum of \$5,465.97 paid the Northern Commercial Co. of Fairbanks under the same settlement.

XII.

Stuart E. Tope had authority to pledge the credit of and incur indebtedness on behalf of Oaks Construction Co.

XIII.

There should be no recovery on the counterclaim filed herein.

XIV.

Stuart E. Tope is also entitled to judgment against Carl E. Oaks for his costs and disbursements herein as taxed by the Clerk of the above entitled Court, plus a reasonable attorney's fee of \$.....

or

Stuart E. Tope is also entitled to judgment against Carl E. Oaks for his costs and disbursements as taxed by the Clerk of the above-entitled Court, plus an attorney's fee computed in accordance with Rule 25 of the Amended Uniform Rules for the District Courts for the District of Alaska,

based on the sum of \$. for a non-lien, contested case.

XV.

Stuart E. Tope is entitled to interest on said judgment from the date of the same.

or

Stuart E. Tope is entitled to interest on said sum of \$4,109.53 at the rate of 6% per annum from August 15, 1954.

or

Stuart E. Tope is entitled to interest on said sum of \$9,575.50 at the rate of 6% per annum from August 15, 1954.

Part Two

Defendants hereby move the Court to amend the judgment dated October 23, 1958, and heretofore entered herein on November 7, 1958, so as to conform to amended and additional findings and conclusions, which are hereby requested, that are in accord with the preponderance of the evidence admitted, of the following nature:

Findings of Fact

I.

Defendants request the findings numbered I to XII, inclusive, heretofore set forth.

II.

Stuart E. Tope incorporated Stuart Construction Co., Inc., in 1952. The only stockholders there have

ever been of said corporation are Stuart E. Tope, his wife and his brother-in-law. Corporate records kept were fragmentary, kept spasmodically and are most irregular. Stuart E. Tope used the corporate bank account as his personal account and advanced monies to and took monies from the corporation at his will. Stuart E. Tope obtained equipment and made contracts in his own name or that of the corporation as he saw fit. Insofar as there was corporate action, it was taken at the instigation of Stuart E. Tope alone. The affairs of Stuart E. Tope and the affairs of the corporation were so intermingled that it is impossible to distinguish between the two, and the acts of one cannot be distinguished from the acts of the other.

III.

The complaint filed herein is so worded as to seek recovery by either plaintiff but limit liability on a counterclaim to the plaintiff corporation alone.

IV.

At the request of Stuart E. Tope, he received weekly advances of monies earned under said subcontract of December 17, 1953, of \$250.00.

V.

Plaintiffs were without funds necessary to meet the payroll of the employees performing the work called for by said subcontract of December 17, 1953; and the same were, at the request of Stuart E. Tope, advanced by Oaks Construction Co. and charged against the same earnings.

VI.

Plaintiffs progressed slowly with the work called for by said subcontract of December 17, 1953; and, to complete said work according to the plans and specifications of said contract of December 17, 1953, and to prevent delay and penalty in connection with the work contracted to be performed by Oaks Construction Co. from Williams, McLaughlin and Marwell, other equipment was put to work, with plaintiffs' knowledge and tacit consent; and appropriate charges made against earnings.

VII.

The equipment used by plaintiffs was old and continually needed repair, and Stuart E. Tope was absent from the job site a large amount of time while seeking necessary repair parts. This absence necessitated supervision of the work by the personnel of Oaks Construction Co. Stuart E. Tope had no previous experience in clearing right of way at all, or in sub-zero temperatures.

VIII.

Stuart E. Tope had possession of three caterpillar tractors, a Dodge truck, a Ford station wagon and a GMC pickup truck which were used in the course of performing the work called for by said subcontract of December 17, 1953. All of this equipment was used equipment owned by Northern Commercial Co. of Fairbanks but possessed by Stuart E. Tope under rental agreements with option to purchase. The equipment was in condition satisfactory for

summer operation but was not able to withstand the stress of the work called for by the subcontract of December 17, 1953, in sub-zero, winter operation.

IX.

No bond was ever furnished as called for by said subcontract of December 17, 1953, but Stuart E. Tope attempted to get such a bond both before and after the execution of said subcontract of December 17, 1953.

X.

Weekly payroll reports and monthly progress reports were furnished Stuart E. Tope showing the charges made by Oaks Construction Co. against the earnings under said subcontract of December 17, 1953, and no objection was ever made to such charges.

XI.

Under date of February 6, 1954, Stuart Construction Co., Inc., made a request for a progress payment on a footage basis for the period ending January 29, 1954. This request was over the signature of Stuart E. Tope.

XII.

The complaint herein was filed February 10, 1955; however, annual corporation taxes due the Territory of Alaska from plaintiff corporation on January 1, 1958, were not paid until May 23, 1958. The annual report of Stuart Construction Co., Inc., for the year ending September 30, 1955, and due December 1, 1955, was not filed until December 10, 1956; and

annual reports for the years ending September 30, 1956, and September 30, 1957, and due December 1, 1956, and December 1, 1957, were not filed until August 13, 1958.

XIII.

Plaintiffs were in violation of one or more of the terms of said subcontract of December 17, 1953, from the beginning; and, finally, Oaks Construction Co. was forced to and did give formal notice as required by the terms of said subcontract and take over the work called for and complete it at the expense of plaintiffs.

XIV.

On October 4, 1954, in order to prevent the Northern Commercial Co. of Fairbanks from again tying up the funds due Oaks Construction Co., as the N. C. Co. had previously done, from Williams, McLaughlin & Marwell as a result of monies owed the N. C. Co. for the caterpillars, trucks and station wagon in the possession of Stuart E. Tope and used in the course of the work called for by said subcontract of December 17, 1953, Oaks Construction Co. made a settlement with the Northern Commercial Co. whereby Oaks Construction Co. agreed to pay Northern Commercial Co. the total sum of \$10,798.47 to apply against the account of Northern Commercial Co. carried in the name of Stuart E. Tope. Said amount was paid, and the account carried in the name of Stuart E. Tope credited accordingly by the Northern Commercial Co., and the payment charged against earnings under said subcontract of December 17, 1953.

XV.

Total monies earned under said subcontract of December 17, 1953, according to its terms, were \$33,335.47; but the monies actually paid by Oaks Construction Co. to perform the work called for by said subcontract are \$70,834.11, a difference of \$37,498.64.

XVI.

In connection with work called for by said subcontract of December 17, 1953, Stuart E. Tope, in the name of Stuart Construction Co., Inc., incurred indebtedness and pledged the credit of Oaks Construction Co. for which sums Oaks Construction Co. is responsible under the bond it gave Williams, McLaughlin and Marwell, in the total amount of \$5,247.01, for which sum Oaks Construction Co. sought recovery against plaintiffs by way of counterclaim.

XVII.

Also as a result of the pledging of the credit of Oaks Construction Co. by Stuart E. Tope and in the name of Stuart Construction Co., Inc., Oaks Construction Co. is currently defending two actions at law in Fairbanks, Alaska, for the expenses and damages of which Oaks Construction Co. counterclaimed against plaintiff in the amount of \$3,000.00.

XVIII.

Plaintiffs, without authority or justification, wilfully pledged the credit of Oaks Construction Co. and subjected Oaks Construction Co. to unnecessary expense and have seriously injured and jeopardized the credit rating and business reputation of Oaks

Construction Co., for which Oaks Construction Co., by way of counterclaim, seeks punitive damages against plaintiffs.

XIX.

Oaks Construction Co. also counterclaimed against plaintiffs for damages resulting from Oaks Construction Co., as a result of the activities of plaintiffs, being unable to complete the work Oaks Construction Co. contracted to do on said pipeline under subcontract with Williams, McLaughlin and Marwell. However, this work has never been subjected to final audit by Oaks Construction Co.; and Oaks Construction Co. abandoned this part of its counterclaim.

Conclusions of Law

Based on the foregoing findings of fact, the Court makes the following conclusions of law:

I.

The statutory requirements of basing an action under the Miller Act (Title 40, USCA, Sec. 270) were not met, and no recovery can be had under the provisions of said act.

II.

No privity of contract ever existed between either plaintiff and one or more of the following, namely: Williams Bros. Co., McLaughlin, Inc., and Marwell Construction Co., Ltd.

III.

The alter ego principle is applicable to this case, and Stuart E. Tope and Stuart Construction Co., Inc., are one and the same legal entity.

IV.

By virtue of having failed to pay and file and to allege and prove such payment and filing of corporate taxes and annual reports required by the laws of the Territory of Alaska, Stuart Construction Co., Inc., is not permitted to begin or maintain this action.

V.

Williams, McLaughlin and Marwell, the joint venture, is entitled to judgment against plaintiffs, jointly and severally, on the First Count of the complaint for their costs and disbursements as taxed by the Clerk of the above-entitled Court, plus a reasonable attorney's fee as computed by Rule 25, Amended Uniform Rules for the District Courts of the District of Alaska, for a contested, non-lien case, in the amount of \$53,620.00.

VI.

Oaks Construction Co. is entitled to judgment against plaintiffs, jointly and severally, on the First Count of the complaint for its costs and disbursements as taxed by the Clerk of the above-entitled Court, plus a reasonable attorney's fee as computed by Rule 25, Amended Uniform Rules for the District Courts of the District of Alaska, for a contested, non-lien case, in the amount of \$53,620.00.

VII.

Having assigned all earnings under the work called for by said subcontract of December 17, 1953, neither plaintiff is a real party in interest herein.

VIII.

Plaintiffs failed to complete the work called for by said subcontract of December 17, 1953, defaulted thereunder, and Oaks Construction Co. is entitled to judgment against plaintiffs, jointly and severally, in the amount of \$37,498.64.

IX.

Plaintiffs had no right or authority to pledge the credit of, or incur indebtedness on behalf of Oaks Construction Co., and Oaks Construction Co. is entitled to judgment against plaintiffs, jointly and severally, in the amount of \$5,247.01 for monies paid by Oaks Construction Co. as a result of such unauthorized pledging and incurring of indebtedness.

X.

Oaks Construction Co. is entitled to judgment against plaintiffs, jointly and severally, in the amount of \$3,000.00 for damages and expenses in defending actions at law in Fairbanks, Alaska, based on the unauthorized pledging by plaintiffs of the credit of Oaks Construction Co.

XI.

Oaks Construction Co. is entitled to judgment against plaintiffs, jointly and severally, in the amount of \$25,000.00 as punitive damages for the wilful and malicious damage by plaintiffs of the credit rating and business reputation of Oaks Construction Co.

XII.

Oaks Construction Co. is entitled to judgment

against plaintiffs, jointly and severally, for its costs and disbursements herein, including an attorney's fee computed, with respect to its counterclaim, on the basis of Rule 25, Amended Uniform Rules for the District Courts of the District of Alaska, for a contested, non-lien case in the amount of \$70,745.65.

XIII.

Stuart E. Tope is entitled to recover nothing by virtue of the Second Count of the complaint filed herein.

This motion is based on Rule 52(b) of the Federal Rules of Civil Procedure and on the Memorandum filed concurrently herewith.

/s/ JOHN C. DUNN,
Attorney for Defendants.

[Endorsed]: Filed November 17, 1958.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM

Since the filing of the original memorandum opinion, followed by findings of fact, and conclusions of law, with judgment in favor of the plaintiff, Stuart E. Tope, able counsel for the defendant has seriously challenged some (not all) of the findings, as well as the conclusions of law.

As indicated in the memorandum, the issues were made confusing by sundry cross currents and conflicting theories. Initially, the suit was filed under

the provisions of Section 170b, Title 40, U. S. C. A. For obvious reasons, that theory did not work out. This was explained in the original memorandum opinion.

As an alternative, the plaintiff, Stuart E. Tope, sought recovery on the theory of quantum meruit, and decision was rendered upon that theory. However, even upon that theory, the evidence was varied. It was the contention of counsel for the personal plaintiff that the defendant had used plaintiff's equipment over a considerable period of time, and that he was entitled, as a matter of law, to claim compensation or a fair return for its use. The theory of the personal plaintiff was that the equipment was used under circumstances that would entitle him to \$18.00 per hour for each of three caterpillars, and that, upon that theory, he would be obliged to pay for repairs and upkeep. Upon that particular theory, the evidence indicates that the plaintiff should concede or allow a deduction of approximately \$17,000.00 to defray the cost of operation.

It was the expressed thought that there was a sort of a contractual arrangement between the Defendant Oaks and the personal plaintiff. However, a re-examination of the pleadings and the evidence does not disclose any kind of contractual arrangement. Moreover, upon that theory, it was the contention of the plaintiff (and, in that, he was supported by evidence) that the defendant had the use of plaintiff's equipment over a much longer period of time than that acknowledged by the defendant.

Computation upon the personal plaintiff's theory would have entitled him to a considerably larger judgment than rendered by the court.

With so many cross currents and conflicting theories, it seemed fair and proper, in the light of the testimony, to allow the personal plaintiff a return for the use of his equipment for the exact time acknowledged by the defendant that the equipment had been used. And, upon the evidence, a naked rental of \$35.00 per hour seemed proper. This theory was a concession to the defendant. For, as indicated, a computation based upon the personal plaintiff's proof as to the time the equipment was in the custody of the defendant would have entitled him to a very considerable sum at the rate of \$18.00 per hour, less, of course, the cost of upkeep.

All of the testimony justified the theory upon which the case was decided.

Able and industrious counsel for the defendant challenges the court to say why \$35.00 per hour was allowed whereas the personal plaintiff, on behalf of the corporate plaintiff, kept books upon the theory of \$25.00 per hour. As heretofore indicated, that theory accounted for the use of the equipment over a much longer period of time. Computed upon that theory, as heretofore stated, the personal plaintiff would have been entitled to a much larger judgment.

Again, counsel for the defendant inquires why the defendant was only allowed a credit of \$5,332.50 on the claim of Northern Commercial Company whereas the defendant paid approximately \$10,-

000.00. The testimony disclosed that this was a compromise of one-half the rental which was due the Northern Commercial Company from the personal plaintiff; the balance related to spare parts, which, clearly, under the theory of the decision, became an obligation of the defendant.

It follows from the above that the defendant's motion should be denied, and that the findings of fact, and conclusions of law, as heretofore filed, should remain unaltered, and the judgment should stand as heretofore rendered, and it will be so ordered.

Dated December 11, 1958.

/s/ ALBERT L. REEVES,
Visiting Judge.

[Endorsed]: Filed December 15, 1958.

[Title of District Court and Cause.]

ORDER

As per supplemental memorandum this day filed, it is hereby ordered that the defendant's motion for a stay order, for a modification of the judgment, findings of fact, and conclusions of law, heretofore entered, should be and the same hereby is denied.

Dated December 11, 1958.

/s/ ALBERT L. REEVES,
Visiting Judge.

[Endorsed]: Filed and entered December 15, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Clerk of the District Court, Third Division,
District of Alaska:

Sir:

Notice is hereby given that the defendants Carl E. Oaks, Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., hereby appeal to the Ninth Circuit from the judgment and the whole thereof, except insofar as the same is a judgment of dismissal as to defendants J. Butcher and J. E. Noonan, of the District Court for the Third Division, District of Alaska, entered in the above-entitled cause, dated October 23, 1958, and docketed November 7, 1958, and for which the time for taking an appeal was stayed by virtue of appropriate order denying the motion for modification of judgment and the findings of fact and conclusion of law and for additional findings of fact and conclusions of law, which order was dated December 11, 1958, and docketed December 15, 1958.

/s/ JOHN C. DUNN,

Attorney for Defendants.

[Endorsed]: Filed January 12, 1959.

In the District Court for the District of
Alaska, Third Division

No. A-10,656

UNITED STATES OF AMERICA, for the Use
and Benefit of STUART CONSTRUCTION
CO., INC., a Corporation, and STUART E.
TOPE, an Individual,

Plaintiffs,

vs.

CARL E. OAKS, J. BUTCHER and J. E.
NOONAN, d/b/a Oaks Construction Com-
pany, WILLIAMS BROTHERS COMPANY,
McLAUGHLIN, INC., and MARWELL CON-
STRUCTION COMPANY, LTD.,

Defendants.

Before: The Honorable Albert L. Reeves,
U. S. District Judge.

TRANSCRIPT OF PROCEEDINGS ON TRIAL

Anchorage, Alaska

August 11, 1958—10:00 o'Clock A.M.

Appearances:

BUELL A. NESBETT,
Attorney at Law,
For the Plaintiffs.

JOHN C. DUNN,
Attorney at Law,
For the Defendants.

Proceedings

The Court: Gentlemen at the Bar, have you any matters you want to take up preliminary to the trial of the case? As I gather, from a very cursory and very quick examination of the pleadings, the whole issue is between two subcontractors in this case.

Mr. Nesbett: That is true, your Honor, and Mr. Dunn was here a moment ago and he just stepped out.

The Court: He will be here in a moment, and—Several subcontractors were named that apparently had nothing to do with it because the controversy is between the Stuart Construction Company and the Oaks Construction Company, isn't that it?

Mr. Nesbett: That is true, your Honor.

The Court: And I think that there is a lot of alter egos here. I take it the plaintiff is really the so stated Stuart E. Tope as an alter ego of the Stuart Construction Company?

Mr. Nesbett: Yes, sir.

The Court: So I take Oaks Construction Company was a subcontractor and the plaintiff had a subcontract under the Oaks Construction Company.

Mr. Nesbett: Yes, your Honor. This involved a section of the pipeline clearance work and three contractors joined together in a joint venture to be the prime contractor.

The Court: Yes—You mean, were the prime contractor?

Mr. Nesbett: Yes, sir, they were the prime contractor for the clearance work. [5*]

The Court: I see.

Mr. Nesbett: And those three companies were Williams Brothers, McLaughlin, Inc., and Marwell.

The Court: I see, and each of them had a section of the road, did they?

Mr. Nesbett: No, sir. They were just three general contractors that joined together as a joint venture and apparently bid this in so they got the job of clearing the six or eight hundred miles of pipeline right of way.

The Court: From some place to Fairbanks?

Mr. Nesbett: From Haines, Alaska, to Fairbanks.

The Court: Where is Haines?

Mr. Nesbett: Haines, your Honor, is south of here and close to Juneau.

The Court: I see.

Mr. Nesbett: And the defense aspect of building this pipeline was to have an unloading point for tankers that could come up the inside steamship passage from Seattle.

The Court: And then pump the oil up?

Mr. Nesbett: And pump the oil clear to Fairbanks without having to come out in the open sea, so in order to build the line to Haines from Fairbanks area, you have to cross a portion of the northwest tip of Canada.

The Court: Yes.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Nesbett: So these three contractors joined as a joint [6] venture, called up here, called themselves Williams, McLaughlin and Marwell.

The Court: Were they the general contractors?

Mr. Nesbett: They were the prime contractors.

The Court: They were?

Mr. Nesbett: Yes. So then they turned around as we are informed here, and from the depositions, the information we have gathered, they turned around and subed the clearance work to one of the prime contractors, Williams Brothers; in other words, he became a sub to his own prime contract. Then Williams turned around and subed a portion, if not all, of the work to Oaks.

The Court: I see, and then Oaks——

Mr. Nesbett: And Oaks turned around and subed again.

The Court: So really in the trial of the case (I don't like to talk about it unless Mr. Dunn is here) but the main controversy—or the controversy is between Oaks Construction Company and the plaintiff?

Mr. Nesbett: That's true. The prime contractors were named because the Miller Act was involved, and——

The Court: Exactly.

Mr. Nesbett: And that was the reason. I was going to cover all that in the opening statement.

The Court: That is good because—Now, Mr. Dunn, you represent the defendant?

Mr. Dunn: That is true, sir. [7]

The Court: And are you Mr. Nesbett?

Mr. Nesbett: Yes.

The Court: Mr. Nesbett, and Mr. Dunn. Mr. Dunn, we were just talking about the issue here, and Mr. Nesbett was explaining the ramifications of these various contractors and how it all came about, and how that there was a general contract and then subcontracts even from the general contracts to sublet, contract, each other, and your client then was a subcontractor under the Oaks Construction Company. That is correct, is it?

Mr. Dunn: Yes, sir. I think, however, that the pleadings are a little bit in error here.

The Court: Well can that be straightened out in your opening statements?

Mr. Dunn: I am not sure Mr. Nesbett is apprised of this, just in order to keep the record straight, he alleges in his complaint that Williams Brothers Company, McLaughlin, Inc., and Marwell Construction Company, Ltd., entered into a subcontract with Williams and McLaughlin, and then he proceeds to the effect that Oaks entered into a subcontract with Williams Brothers.

The Court: Well that may be but I regard that as unimportant because I understand if Oaks Construction Company was a subcontractor, then I understand that your client, that is you represent Oaks Construction Company, and that the plaintiff subcontracted from Oaks Construction Company.

Mr. Dunn: That is correct. [8]

The Court: Well that is the whole issue here then, and it is claimed by plaintiff that Oaks Construction Company owes him money, so that I take

it—regardless of these other averments that that will be the issue in the case.

Mr. Dunn: Well, your Honor, it seems to me that the pleadings should, and I don't care because if anything this is advantageous to me, but it seems to me that the pleadings should establish the connection of Oaks Construction Company through whatever subcontracts might exist to the prime contractor.

The Court: Well is it—is there a controversy at issue as to whether the Oaks Construction Company was a subcontractor?

Mr. Dunn: Actually I don't know what terminology you want to use. Oaks Construction Company was what I term a sub, subcontractor.

The Court: Exactly a sub, subcontractor, and your client was sub under the Oaks Construction Company?

Mr. Dunn: Mr. Nesbett's client.

The Court: I mean Mr. Nesbett's client.

Mr. Dunn: Yes, sir, that is true. The only thing is I was thinking for the sake of the record it might be well to have that connection reflected in the pleadings. There is a gap in it the way it is now. I don't care.

The Court: I couldn't rule on that until I hear the opening statement, Mr. Nesbett will make the opening statement—until I find out. [9]

Mr. Nesbett: The statement I gave, your Honor, on the connection between the companies was what I had gathered from taking depositions in the case but in any event, your Honor, the main issue here

is whether or not Stuart Construction Company, Inc., which was a corporation in existence in November and December of 1953, entered into a binding contract with Oaks Construction Company to clear a certain section of the pipeline.

The Court: That's the way I gather it.

Mr. Nesbett: Now, the copy of the contract that was signed by the parties, that is by Oaks and Stuart Construction Company, Inc., is pleaded as an exhibit to the complaint, your Honor.

The Court: Yes.

Mr. Nesbett: And the point that we are making here, at this time now having had as much time elapse as has elapsed and having taken the depositions that we have taken and knowing the facts that we know, our position is that although a formal contract was signed by Stuart Construction Company, Inc., by its president, Stuart Tope, who sits here at the table with me, that actually as a matter of fact that contract was never followed, that Oaks, Carl Oaks, a partner in Oaks Construction Company, Inc., disregarded the contract from the very beginning and that Stuart E. Tope, who is also a plaintiff in this case is entitled nevertheless to recover the reasonable rental value of the caterpillars and other equipment that he used on this job because he did spend many hours on the job working, whereas he was not given the leeway or the authority of a subcontractor. Now, in that connection, your Honor, we will show [10] by the testimony of Mr. Tope that he first discussed participating with Mr. Oaks on this pipeline clearing on

November of 1953 in Anchorage, that at that time Mr. Oaks asked Mr. Tope, and they had known each other before that, "Will you lease me the three caterpillars that you have to use on this pipeline that I have a subcontract"—or "I expect to get a subcontract," that Mr. Tope said "no" he would not lease them, that sometime later, when Mr. Tope was awarded the subcontract, they again discussed it and the result of that discussion was the signing of the contract that is attached to the complaint as Exhibit A.

The Court: And you have stated in your complaint that that contract was he was to furnish tools, labor, equipment and supplies to clear a portion of the right of way?

Mr. Nesbett: That is right, your Honor. Now, the evidence will show that of the total right of way that Mr. Oaks was a subcontract—or as a sub, subcontractor, to clear the mileage, was approximately some 600 odd miles.

The Court: Yes. Well, Mr. Stuart didn't take over all of that, did he?

Mr. Nesbett: No, sir. That as of—as far as Mr. Stuart Tope is concerned, he agreed to clear approximately 100 miles of that pipeline right of way roughly between Tok Junction and a place called Big Delta, Alaska.

The Court: Now, will you tell me again, Mr. Nesbett, did Mr. Stuart's contract—was for what distance? [11]

Mr. Nesbett: Approximately 100 miles of the

total right of way clearing that Mr. Oaks had as a subcontractor.

The Court: Yes. And it was between what point?

Mr. Nesbett: Between Tok (T-o-k) Junction and Big Delta.

The Court: And Big Delta.

Mr. Nesbett: Big Delta, yes, sir. That is the name of the city.

The Court: Is that this end of it or close to Fairbanks? It is not important. I just asked out of curiosity.

Mr. Nesbett: Actually I believe it is toward the Haines end and toward Fairbanks to go to, then go to Big Delta, or at least the northerly end. It is over reasonably close to the Canadian border. Now, the price per lineal foot that this contract called for was 6½ cents. The contract will show that as a subcontractor, Stuart Construction Company, Inc., was required to furnish performance and payment bonds in each, in the amount of one-half the contract price, that Stuart Construction Company was to handle the payrolls of its own employees, that it was to carry the workmen's compensation insurance, public liability insurance and on the men that it employed.

The Court: Those were all conditions precedent—that is that Stuart Construction Company was to furnish an insurance bond or fidelity bond in matters of that kind?

Mr. Nesbett: That is true.

The Court: To qualify himself to take on the contract?

Mr. Nesbett: Yes, sir. Now, your Honor, the evidence will [12] show that the contract, after it was signed by the two parties on December 17 of 1953, that Mr. Tope was instructed by Mr. Oaks to get the performance and payment bond that he was required to get under that contract, that Mr. Tope although he has been in the construction business a number of years and has operated heavy equipment on jobs that actually he had never entered into any formal contract of this nature before, that he attempted to get a performance bond here in the area and couldn't do it, that he tried two places in Anchorage, was unable to get it and informed Mr. Oaks that he could not get the performance bond or the payments bond and Mr. Oaks sent him, or recommended that he see another contractor here called William Olday, who might go his bond, and he contacted Mr. Olday and Mr. Olday contacted Mr. Oaks and Mr. Olday deferred a decision on whether or not he would go the performance and payment bond for Tope until he had made a trip out to the States and come back; that in the meantime, Mr. Oaks had told Tope, Stuart Tope, take your equipment on up and get ready to go to work, that if anyone asks you your status say you are working for me. Oaks himself, of course, was bonded for five hundred thousand dollars to perform the whole pipeline; that as a result of those conversations and occurrences, Mr. Tope, with some of Mr. Oaks' equipment, removed the last two of his caterpillars, large D-8 caterpillars that were in this area, two in the area of Tok

Junction, in order to commence work; that he had no money; that Mr. Tope had no money and advised Mr. Oaks that he had no money, only the equipment, and that Mr. Oaks put him on his, Oaks', payroll [13] as a foreman at \$250.00 per week, and Mr. Tope was carried all through the time he worked on the pipeline on Mr. Oaks' payroll as a foreman at that wage; that as far as the employees that were to be hired initially to operate Tope's three cats, Oaks himself dictated to Tope who those employees would be; that after he had arrived in Tok Junction and had commenced operation on the clearance of his section of the pipeline, which commenced about January 3, 1954, Mr. Tope himself for the first time attempted to hire a man to operate one of his cats, that he attempted to hire a man named Arthur Harlan and on his first attempt to hire a man he found that he was not given the authority by Oaks Construction Company to hire anybody; that as a result of learning that, he had a showdown with Oaks Construction Company's general superintendent of the whole area of the pipeline, a man named Roy Crawford, and he was advised by Crawford that Oaks was paying the men and Oaks would determine who was to work on the cats. Secondly, that in attempting to direct the men who were running his caterpillars out of Tok Junction, Mr. Tope learned immediately that he was to take orders from a man named Hager, Warren Hager, who had been placed on that section by Oaks Construction Company and advised that he was in charge of the operations; that it was not more than

three or four days after that he and Hager, that is Tope and Hager worked together, that they had a showdown on that point. The showdown was taken to Roy Crawford, the General Superintendent for Oaks, and to Oaks himself, who came through there, and that they informed Tope that he was taking his orders [14] from Hager.

The Court: Who was employed by Oaks?

Mr. Nesbett: Yes. As well as Mr. Crawford who was the general superintendent of Mr. Oaks.

The Court: Under Oaks?

Mr. Nesbett: Under Oaks. That Mr. Tope, not having any money and not meeting his payrolls and not having his bond and not having anything except the equipment went ahead nevertheless under that arrangement, your Honor, that—of the equipment furnished by Mr. Tope, three of the main pieces were large D-8 Caterpillar tractors, which as of that time were the largest tractors available on the market. Since that time there has been a D-9 put on the market, I understand. That Mr. Tope was buying those three caterpillars and had been buying them since June, July and August of 1953 on a contract.

The Court: What you mean by that was he was paying for them on the installment plan?

Mr. Nesbett: Yes, sir.

The Court: Sort of a conditional sales?

Mr. Nesbett: No, sir, it was not quite that but it was very similar. It was a contract like this, your Honor. It was given by the Northern Commercial Company of Fairbanks. That is a large——

The Court: Well as far as Mr. Oaks is concerned he was the owner of them?

Mr. Nesbett: Well, I will point out later, your Honor, [15] that might have—could have been Mr. Oaks' stand but it didn't turn out to be his stand later.

The Court: I see.

Mr. Nesbett: Mr. Tope was buying these three caterpillars on what they call a rental-option purchase agreement with NC Company, the total price to be anywhere from eight-twelve thousand dollars for each piece of equipment, that the rental was to be so much per month except during the winter and spring months. If he didn't use the equipment there was to be no rental charge; that after he had paid one-third of a certain amount, he could then exercise an option to buy the equipment and all previous rental payments would apply on the purchase price.

The Court: Title remained in the vendor?

Mr. Nesbett: Yes, under that contract until an exercise of the option had been made by the vendee; that all three pieces of equipment were under such contracts at the time he started to work on the pipeline; that in anticipation of the needs of that pipeline job, Mr. Tope went to the NC Company in Fairbanks and purchased a new 2½-ton Dodge truck, which had on it a 500-gal. fuel tank.

The Court: Did he buy that outright?

Mr. Nesbett: He bought that under the same rental purchase arrangement that he had on the caterpillars; that he also purchased a Ford station

wagon from a used car company in Fairbanks at a price somewhere in the neighborhood of \$700, and that he had as his own, at the time he commenced to work on the job, a 2½-ton or [16] rather, pardon me, a half-ton GMC pickup truck, so that he had that——

The Court: Did it belong to him?

Mr. Nesbett: That belonged to Mr. Tope, yes, sir.

The Court: And the station wagon, too, belonged to him?

Mr. Nesbett: Yes, and the 2½-ton fuel tanker and the three caterpillars.

The Court: Well——

Mr. Nesbett: Now, that after Mr. Olday, the general contractor whom he had contacted concerning the performance bond, returned to Anchorage from the United States, he advised Mr. Tope that he could not go the bond, that he would not go the bond, that he had investigated and had been told not to get involved in that particular job. Mr. Olday's deposition is here and he will probably be called as a witness. In any event, that was probably in the middle of January of 1954. Mr. Tope had then been on the job almost two weeks. That Oaks asked Tope to get his performance bond thereafter, that Mr. Tope tried to and couldn't and told Oaks that he had no bond, and that nevertheless the parties went on under the——

The Court: That was the second time?

Mr. Nesbett: Yes, sir.

The Court: And he was already engaged in work, and Mr. Oaks then said go ahead?

Mr. Nesbett: Well Mr. Oaks didn't say stop and he didn't say anything. He did ask him, as far as we know, to get the bond. Tope tried again and said "I can't get it," and they continued [17] on under the arrangements I have described.

The Court: Making \$250 a month?

Mr. Nesbett: \$250 a week. That during all this time, Oaks or his sub-officials dictated who would be employed on the cats; that Oaks paid all the employees that ran Mr. Tope's caterpillars; that Oaks Construction Company carried the Workmen's Compensation Insurance on the men and other insurance that was required to be carried by law on the equipment and the men, and that that arrangement continued throughout the entire relationship which will come before your Honor here piece by piece. That Hager, the man who was immediately over Mr. Tope on that section of the clearance, bossed the caterpillar operators, that he would not let Tope direct the men as to their particular activities and that in effect, and because of the weather and other circumstances, Tope became a repairman and a man that went out and scrounged and bought parts for these caterpillars so as to keep them operating. The evidence will show that in January——

The Court: He paid for the parts himself?

Mr. Nesbett: That he went to the Northern Commercial Company where he was buying these caterpillars and charged the parts.

The Court: To himself?

Mr. Nesbett: Yes, sir.

The Court: Had them charged to himself?

Mr. Nesbett: Yes, your Honor, that is true. The evidence will show in January and February of 1954, the weather in that area [18] of Alaska was extremely cold, going as low as 65 degrees below zero, that the breakage of caterpillar and all metal parts in temperatures as extreme as that is very, very high. That only after they had proceeded out of Tok Junction approximately twelve miles, they ran into, in the area of Cathedral Bluffs, a large rocky area; that the snow was three to four feet deep and the rocks were covered with snow; that with temperatures as low as they were the caterpillar operators would hit these rocks not knowing they were there and break almost every conceivable part of the caterpillar at one time or another and it kept Mr. Tope busy going to Fairbanks getting parts, getting them back and replacing them in order to keep the cats operating. That when they found out they were in this rocky area and realizing the temperature was as low as it was and causing breakage, that Mr. Tope then asked Mr. Hager and Mr. Crawford for permission to move his entire operation from its then location up to Big Delta, the other end of the line he was to clear and to work back toward Tok Junction so as to approach the rocky area only after the weather had moderated, the snow had melted and the caterpillar drivers could see the rocks; that he on several occasions asked to be permitted to do this and that Hager refused, that Crawford refused, and he was

required to work right on through the rocks, which he did. The evidence will show that his caterpillars—that his first caterpillar finally went out of action in the middle of February of 1954 to stay out of action and it was no longer usable operating in these temperatures and on the rocks, had banged the engine up to a point where it couldn't function any longer; that the two other caterpillars and the other equipment [19] were used, continued to go on through the rocks, that his second caterpillar was finally put out of action in about the middle of April of 1954, and that his last caterpillar lasted finally through the rocks all right and was in use on the job until May 1st, until the payroll ending the week of May 1st, 1954, your Honor. In addition to paying the insurance, the payrolls, and paying Mr. Tope a foreman's salary as we have indicated, we will show that Mr.—that the Oaks Construction Company also paid the fuel bills incurred for the equipment that Tope owned and was being used. That——

The Court: But did not pay the repair bills?

Mr. Nesbett: That Mr. Tope—Well the evidence will show that Mr. Tope, aside from the repairs performed by Mr. Tope himself on the equipment, that later a mechanic was employed who helped to make repairs.

The Court: Employed by Oaks?

Mr. Nesbett: Paid by Oaks. That as to the parts used—The parts themselves were charged to Mr. Tope by the Northern Commercial Company in Fairbanks. That after Mr. Tope had attempted

to employ a man named Harlan as a cat driver at the time of commencement of the job, he did shortly afterwards, within a possible two or three weeks, employ Mr. Harlan to work on one of his caterpillars which was down temporarily; that Mr. Harlan did that but that Oaks refused to pay him and that Harlan himself never went to work on the job until——

The Court: Mr. Tope paid him? [20]

Mr. Nesbett: He has never been paid. He will be here as a witness in this case, your Honor. He hasn't been paid for the three days he first worked when Mr. Tope put him on the job, when he was forced to leave a job because he was told that he couldn't work there unless he was put on by Mr. Roy Crawford and Mr. Crawford wouldn't put him on.

The Court: That is the reason why they wouldn't pay him?

Mr. Nesbett: Yes. They wouldn't pay him the second time because he did repair work at the instance of Mr. Tope apparently and not at the instance of Crawford or Hager, and therefore he was never paid. He was not paid for some other work that he did for Oaks Construction Company. The evidence will show, your Honor, that Mr. Tope was backed up on one occasion when he fired one of the employees and that was, as far as we know, the only exercise of authority that he was ever permitted to use on this whole pipeline clearance job. Now, the evidence will show that the man Hager and Mr. Tope didn't get along very well

and approximately six weeks after January 3, commencement of the work, Hager was transferred to some other section of the pipeline by Oaks and a man named Vincent Abbott was transferred in to be—to take Hager's place, that the relationship between Abbott and Tope was the same as that that existed between Hager and Tope.

The Court: That is to say that he didn't recognize Mr. Tope's authority?

Mr. Nesbett: He didn't recognize Mr. Tope's authority [21] at all. Now, the evidence will show that while Mr. Abbott was running that particular section in place of Hager, that without any reference or consultation with Mr. Tope as a subcontractor, that Oaks or some official of Oaks Construction Company caused another caterpillar to be moved down into that area and this caterpillar was rented from a company called Rogers-Babler Construction Company.

The Court: Rented by Oaks?

Mr. Nesbett: Rented by Oaks or some one of his officials and sent down there to work on the job. That Tope was never consulted, that he only knew the job—cat was to be used on the job when he saw it show up and commence to work. The evidence will show that three caterpillars were later brought in in the latter part of February of 1954, these caterpillars being rented from McLaughlin, Inc., one of the joint ventures in this particular clearance contract.

The Court: They supplanted the caterpillars of Mr. Tope?

Mr. Nesbett: They, McLaughlin.

The Court: Either supplanted them or did the same work?

Mr. Nesbett: Yes. They brought their three cats in at Mr. Oaks' instigation and without Mr. Tope's knowledge until it occurred and put them to work on the Big Delta end and worked them back to meet Tope.

The Court: You mean that Mr. Tope wanted to do?

Mr. Nesbett: That is what Mr. Tope wanted to do and was not permitted to do, and the evidence of the witnesses will show that McLaughlin's specific instructions when those cats were [22] permitted to go to Big Delta and work back was that they were to be kept out of the rocks in the area of Cathedral Bluffs, your Honor. That those events, that is renting caterpillars and putting other drivers on that section of the clearance, those things occurred long prior to a letter written in April which, April 16th, which told Mr. Tope that they felt that they should invoke a section of the contract quoting the paragraph number which would permit them to take over and finish the work at his cost. If they felt that he wasn't going to get it done in time, and the evidence will show that the hiring of the other caterpillars occurred long before they had ever given him any such written notice, and that he was not consulted under the arrangements of the contract, as a subcontractor, that he was never treated as a subcontractor throughout the entire operation, and that nevertheless, owning the

equipment, he should be permitted to recover the reasonable rental value of the equipment that was used, which benefitted Oaks. We will show the exact number of hours, your Honor, that each D-8 cat was operated on that job, the day and the hour, the day and number of the hours, and we will present evidence to the effect that to prove that \$25.00 per hour is a reasonable rental rate for a D-8 caterpillar in winter time operation, such as they were engaged in in that area, \$25.00 per hour being that charged by a contractor or owner who furnished the caterpillar, furnished the driver, furnished the fuel, lubrication, and paid the wages of the driver, and took care of all the maintenance.

The Court: That is they did that at a rental of \$25.00 [23] an hour?

Mr. Nesbett: Was a reasonable rental.

The Court: Now, I understand this case Mr. Tope didn't pay the driver, didn't dictate to the driver, didn't pay the expenses and fuel bills, is that right?

Mr. Nesbett: He didn't do that; that is conceded. He didn't do any of that, and so we have taken the figure of \$53,620, which we allege in our complaint as being the value of Mr. Tope's services and equipment, and we have caused an accountant to prepare the cost of operations of that equipment in that area; that is the ages of the men, the fuel oil used, and in preparing this cost of operations, they have used the statements of Oaks Construction Company, which were regularly forwarded to Tope showing the amount of the payrolls advanced and so on,

and arrived at a figure of \$17,000 approximately that should be deducted from the \$53,620 prayed for in the complaint.

The Court: Was there ever any conversation about the machinery, and I understand Mr. Tope was paid \$250 a week for his services there, is that right?

Mr. Nesbett: That is true, sir.

The Court: And was there ever any conversation about the use of the machinery that he had furnished?

Mr. Nesbett: Well the conversations between Oaks and Tope himself were very few. It appears from the depositions and the testimony that I have run across to date possibly Mr. Oaks was only [24] in that area three times during the entire time they were clearing it; maybe four, but that the sum total of the situation is this, your Honor, Oaks Construction Company is maintaining that a contract was in existence all the time and that Tope is bound by that contract and they have charged him all the fuel, all the maintenance, all the bills that they have paid in connection with Tope's operation as well as the rental on the three McLaughlin cats that were brought in, as well as the Rogers-Babler caterpillar rental, and as well as one other cat rental, they have charged that all to his account, against this contract, holding the contract as being binding against Tope and come out with a figure that Tope owes them something like twenty-eight or thirty thousand dollars.

The Court: They ask for permanent relief?

Mr. Nesbett: Yes, sir, and they are maintaining that a contract was in existence and was binding on him.

The Court: Was the contract December 17th, I believe you said, of 1953?

Mr. Nesbett: Yes, sir.

The Court: It was in force all the time notwithstanding the fact that he never got the performance bond?

Mr. Nesbett: That is true, sir. And they had forwarded to him, and we concede this, at regular intervals a recap of the payrolls of the men who were running his equipment, to Stuart Construction Company, Inc., and said they were charging him for those payrolls and from those payrolls Mr. Tope was able to determine the [25] man running a given cat and he figured the exact number of hours that each cat was used and he has only charged on the cat, for example, the one that went out of action on February 16th, that was the end of the rental as far as he was concerned, the sum total of the equipment situation as far as Mr. Tope was concerned. The evidence will show that as of May 1st he had two caterpillars completely out of action with broken down engines and other needed repairs to be done on them and only one that could operate, and that had the starting motor shaft broken and had to be pulled by another cat before it could be operated when he finally moved it off the job. Now, your Honor, there is one other aspect I would like to cover before I sit down and that is

the Northern Commercial Company account against Stuart Tope, and Oaks stepping into the picture with regard to clearing what they consider to be a lien. Now when Tope left this construction job, in the last week in April of 1954, he had not paid Northern Commercial Company any of the monthly rentals called for in his rental-option to purchase contracts. Northern Commercial Company, of course, were charging him the regular thousand or twelve hundred dollars per month rental rate that would be called for in the agreement if he used the caterpillars during those months. Northern Commercial Company in June of 1954 sent a written notice to Oaks Construction Company and also to Williams Brothers, the prime contractors, advising them that they claimed liens for rentals in connection with the usage of Tope's caterpillars on this pipeline job; that Tope himself had gone to Northern Commercial Company in [26] June telling them that he couldn't pay any rentals, he didn't know exactly where he stood as far as money was concerned, that in company with the credit manager of Northern Commercial Company in Fairbanks Tope and the credit manager went to the Northern Commercial Company's attorney who prepared a written notice to the prime contractor and also to Oaks telling them about Northern Commercial Company's lien; that after that notice was given and during the month of August of '54, Mr. Tope himself tried to arrange meetings between representatives of Oaks Construction Company and Williams Brothers and Northern Commercial Company to

try and work some arrangement out that would cause everybody to be satisfied for the use of the equipment. The evidence will show that a representative of Oaks Construction Company came to Fairbanks in August of '54, the day ahead of the scheduled meeting, and left Fairbanks before the meeting and refused to meet with Mr. Tope; that later in October of '54, and believing that Northern Commercial Company had a lien because some of the equipment that they had actual title to was used on the right of way, a settlement was finally negotiated between Northern Commercial Company and Oaks Construction Company. This settlement, as it was finally hammered out, provided that Oaks Construction Company or their bonding companies would pay to Northern Commercial Company the amount of the parts that were supplied during that operation to Tope's cats in the amount of some \$5,300.00, and that they would pay Northern Commercial Company half the amount of the rentals that Tope would ordinarily have paid them on their contracts, and so they [27] settled their two claims off. Tope was not present, didn't know that the settlement was being entered into, didn't consent to it, and still does not consent to it, but nevertheless, on the promised payment of something like \$10,700 NC Company agreed that they would not claim any lien against Oaks or against the prime contractor. Mr. Tope's position is that he had no part in that settlement and does not honor it; however he does admit that he owed them rentals on the equipment and he does admit that he owed

them for the parts that were involved. So, your Honor, of the \$53,620 that we claim, there is, we concede, to be deducted approximately \$17,000 that is what would have been the cost of operation of that equipment if Mr. Tope had met the payrolls, furnished the gas and oil and so forth. And further, there is to be considered from the \$36,922 that would be left, the matter of the fact that NC Company received \$10,798.00; at least \$5,300 of it Tope admits went to pay bills that he owed for spare parts. The sum total of the situation, as far as Tope was concerned, when May 1st came around, two of his cats were thoroughly out of action and he had no money to repair them; one was just able to run; that the result of the prolonged negotiation or failure to enter into or complete any negotiation was that he lost all of his equipment; he lost all of his equity in it.

The Court: That is the vendor took it back?

Mr. Nesbett: The vendor took it back and so he wound up with nothing except two lawsuits, which were filed against him, one for \$3,000 fuel bill, which Oaks Construction Company had guaranteed to a [28] man named Bayless, running the Franklin Mining Company, which they did not pay.

The Court: Used in this operation?

Mr. Nesbett: Yes, sir, which was used in this operation, and actually what happened was Franklin Mining Company hadn't been paid regularly by Oaks and so they cut off the fuel to Tope's spread as they call it. They call a group of caterpillars and equipment up here a spread, you will notice in the

testimony. He cut off Tope's—the fuel to Tope's spread so that immediately caused a meeting between Roy Crawford, Oaks' superintendent and Mr. Bayless, who was supplying the fuel, and Mr. Tope. The result of it was Mr. Crawford told Mr. Bayless that Tope would be paid something on his contract sometime soon and by reason of that Tope wrote a check for \$3,000 to Bayless on the promise of Crawford that by the time it had gone through there would be funds in the bank to honor it. Well it didn't go through; it came back NSF. The evidence will show, and we have Mr. Bayless here to so testify that after and apparently by reason of the hard feelings that had developed between Tope and Oaks that Oaks sent a representative to see Mr. Bayless in Tok Junction and tell him that they should pursue Mr. Tope to collect this \$3,000; that this representative, the office manager and accountant for Oaks, told Mr. Bayless that if he would institute criminal proceedings against Tope for that NSF check that Oaks——

The Court: Because of the fact that no funds were in the bank? [29]

Mr. Nesbett: Yes, sir.

The Court: That is a local territorial law?

Mr. Nesbett: Yes, sir. There is a statute against writing NSF checks. That if Bayless would cause criminal proceedings to take place against Tope that he, Oaks, would reimburse Bayless for any expense he was involved in getting the District Attorney after Tope. That another law suit has resulted and Tope is the defendant in that suit

he is informed, commenced by Mr. Harlan who, as I have mentioned, worked for Mr. Tope, or on his equipment, at various times but was never paid by Oaks Construction Company and that Mr. Harlan never got employment on that clearance job; after the three caterpillars were rented from McLaughlin Brothers and when McLaughlin sent them down with instructions they were to stay out of the rocks, they also insisted that no one but Harlan should take care of those cats, and then only then did Harlan get on the payroll although Tope tried on three occasions to put him on and had been overruled, so Mr. Harlan has commenced a suit.

The Court: Against Mr. Tope?

Mr. Nesbett: And Oaks.

The Court: He sued both of them?

Mr. Nesbett: Yes, sir. And those—both of those suits I mentioned were filed in Fairbanks. And so, your Honor, our claim we concede is \$36,922.00. We have charged as what Mr. Tope has set out as a reasonable monthly rental on the 21½-ton Dodge truck of eight months, for three months and three weeks, the Ford station [30] wagon \$250 a month for three months and three weeks, and the GMC pickup \$250 a month for three months and three weeks. That winter operation in all this equipment is extremely hard on it and it depreciates rapidly. The evidence will show as a matter of fact that in order to lubricate or oil these caterpillars, that extreme temperatures they're working at, your Honor, they shoveled lubricating oil out of the barrels and put it into pots which they heated over

blow torches before they could get it to a consistency to pour into the crank case and that as a matter of fact, for one week after Tope had commenced operations the equipment had to sit idling and run twenty-four hours a day simply because at sixty-five below they found they couldn't operate at all. That somewhere between \$36,922.00 and making allowance for the parts that Mr. Tope concedes he owed NC Company for, that the judgment in favor of Mr. Tope should be in the neighborhood of \$30,000.00 for the use of that equipment.

The Court: Did both parties sign the contract on December 17th?

Mr. Nesbett: They did, yes, sir.

The Court: All right. Mr. Dunn.

Mr. Dunn: Your Honor, it seems to me that even before making an opening statement that I should now move for summary judgment on the first cause of action. I believe Mr. Nesbett stated that the formal contract was never followed but nevertheless, Mr. Tope, as an individual, is entitled to be recompensed I take it on the basis of quantum meruit claim, and if your Honor sees fit to grant [31] that it will of course simplify these proceedings here.

The Court: Well, according to the statement by Mr. Nesbett, both parties proceeded upon the contract, upon the theory that it established a relationship between them. Now, if they did, the suit is here on the contract; that's the burden of the contract. I mean that is the burden of the law suit. The issue, as I understand, is on the contract, and he

says that while some of the conditions precedent were not observed, nevertheless, in part they were on the contract and part in private employment, but in the end he says that they treated the contract as having been violated by the plaintiff and took over and charged him, for instance, the expense of these new cats they got that were brought on, so I don't think—I am not familiar enough with it at this time to make any ruling, as you ask. I will withhold ruling on it, however, until the case develops, and if later on it appears that it ought to be sustained, I will be happy to urge it.

Mr. Dunn: Thank you, your Honor.

The Court: Apparently they all signed the contract?

Mr. Dunn: By all, your Honor.

The Court: That is the two parties here. As I understand, the only parties here, really it is a suit between Mr. Tope and Mr. Oaks?

Mr. Dunn: Well Mr. Tope is not a party to the contract.

The Court: No, sir. I understand that, but I think you allege in your answer that it was an alter ego, that really he is the corporation? [32]

Mr. Dunn: Yes.

The Court: And I take it, as far as Mr. Oaks is concerned that Mr. Carl E. Oaks, that is corporate entity, is an alter ego. I assume that.

Mr. Dunn: Well that is—I'd just as soon you didn't assume, your Honor. Oaks Construction Company—you mean Mr. Oaks is saying that Oaks

Construction Company is his alter ego. That is a partnership, sir.

The Court: It is a partnership. Very well. Not a corporation at all?

Mr. Dunn: Beg your pardon.

The Court: And not a corporation at all?

Mr. Dunn: No, sir.

The Court: And is not the alter ego of Mr. Oaks?

Mr. Dunn: No, sir.

The Court: Very well, if it is. I'd take it as much to say he had a partner in the matter.

Mr. Dunn: He had two, yes, sir. Well, your Honor, what I anticipated to be the least, in my point of view, the difficulty in this case, is already beginning to appear.

The Court: Yes. It is a very complex situation, I would say.

Mr. Dunn: I prefer the word "confusing" and "inconsistent" to complex, your Honor.

The Court: Very well. [33]

Mr. Dunn: Throughout the pre-trial proceedings (I use that word loosely, not technically), I have been impressed by inconsistency. Now it began with the complaint which of course is permissible to allege inconsistent cause of action, and that inconsistency permeates action. It seems to me at one time Mr. Tope is saying "yea" and Stuart Construction, Inc., is saying "nay," and I think one of the things that would be wise for us to be careful about here is to keep these parties separate throughout the trial. Now, our position generally is this:

I don't think, and I hope that we will be able to establish the fact that there is any difference between Stuart Construction Company, Inc., and Stuart E. Tope. I think they're one and the same. We contend that whatever work was performed on this particular section of the pipeline was performed under a contract.

The Court: That is under the contract of December 17th?

Mr. Dunn: That is true.

The Court: Now, for your Honor to avoid possible confusion on the geography, I could if Mr. Nesbett consents, furnish you with the road map because we will be speaking of north and south and actually that road doesn't run north and south; it runs from northwest to southeast.

The Court: Well, I just assumed that running through main location in Fairbanks that that would be right, running toward Juneau, because Fairbanks is northwest of Juneau.

Mr. Dunn: Fairbanks is pretty well north, I believe, of [34] Big Delta and you proceed from Fairbanks to Big Delta, I think you'll find your travel pretty much southeast to Tok.

The Court: That is to get to the southern terminus of the pipeline?

Mr. Dunn: There again, your Honor, no, because that pipeline just keeps right on going. It goes all the way through Canada.

The Court: I said terminus. I am thinking about this—these contracts. That is, as I understand, the

contracts covered the pipeline from some point near Juneau up to Fairbanks.

Mr. Dunn: The prime contract?

The Court: Exactly, the prime contract. So we have nothing to do with the pipeline as it went on other places.

Mr. Dunn: Well, actually, your Honor, I think the only part of it—the only contract with which we are concerned and the only part of the line with which we are concerned is that portion between Big Delta and Tok Junction.

The Court: Exactly. That section, the area covered by the contract.

Mr. Dunn: Which I think you will find approximately 100 miles.

The Court: That is what counsel said.

Mr. Dunn: And is, in fact, a very small portion of the overall line.

The Court: I understand that.

Mr. Dunn: To return, we don't think there is any difference [35] between Stuart Construction Company and Mr. Tope. We think whatever work was done was done under the contract, and the contract which we speak of is the one which is attached to the complaint, December 17th or whatever it is, and we contend that we paid every cent called for by that contract, and as a result of paying every cent called for by the contract, we owe neither Stuart Construction Company or Mr. Tope anything and that further, we paid a lot more than what was called for by that contract, and that as a result,

Mr. Tope and Stuart Construction Company jointly owe us the amount of that overage.

The Court: I understand from Mr. Nesbett the Oaks Construction Company took over the contract and completed it; that is they claimed they did that but when they went out and got additional caterpillars and other equipment——

Mr. Dunn: That and also, your Honor, this point will come out and we consider it quite important, and it is that Mr. Tope received weekly invoices of charges made against Stuart Construction Company.

The Court: Well, to clarify it in my mind, Mr. Dunn, Mr. Nesbett indicated they put him on the payroll. Was that a mere drawing account of \$250.00 a week?

Mr. Dunn: Yes, or more accurately stated, for the sub-contractor to be put on wages or on a salary so that he has got pocket money. I don't know how familiar your Honor is with construction. You may know one hundred times more about it than I—[36] it is possible that I know as much about it as you.

The Court: I expect you know more about it. I have—well I have tried many contracts of this nature, at different times; like you say they have different customs but if you are under a contract why of course they had no right to put him on a salary as if he were an employee. If they were operating under this contract, it couldn't be more than a drawing account and notwithstanding they may have characterized the negotiations with the custom, put him on a salary, and—but technically

the effect of it would have to be a drawing account.

Mr. Dunn: Yes, sir. Now the way these things actually work is this: The person to follow down through the chain of command on one of these contracts, at least this is my understanding of it, and if I remember correctly, I'll like being corrected by Mr. Nesbett: My understanding is that the person who has really got the money is the United States Government, and everybody is more or less working on the money of the United States Government, and the farther removed you become from the prime contractor, the greater the reliance on the money of the United States Government. Now, your prime contractor is usually financially stable. They're big people. Williams and McLaughlin and Marwell, the joint venture, which was the prime contractor on this, individually each of them, as I understand it, have extensive holdings.

The Court: Well now, if I interrupt you, you tell me, Mr. Dunn, because it is my duty to listen to you and not your duty to [37] listen to me but do I understand Oaks Construction Company was not one of the prime contractors?

Mr. Dunn: That is correct, sir.

The Court: Very well.

Mr. Dunn: You see, we are concerned or rather—well we are concerned with 100 miles but the prime contract covering that 100 miles was concerned with 300 miles.

The Court: Or 600 miles. Whatever it might be we are not concerned with that in this case?

Mr. Dunn: Well I believe it was 300. Am I in error?

Mr. Oaks: Three hundred miles in Alaska and approximately the same in Canada.

Mr. Dunn: The section of the line from Fairbanks to the Canadian border was roughly 300 miles. Now that was let under one prime contract to Williams, McLaughlin and Marwell, a joint venture, consisting of three corporations. Now, that pipeline went to—went on over into Canada but that was under a separate prime contract. Now Williams, McLaughlin and Marwell, the prime contractors, as I mentioned before, apparently quite financially secure. They have a large bonding capacity and in turn start to sub this work out. It is a huge project, I imagine, hundreds of millions of dollars involved, and in this case, they subed the right-of-way clearing to one of the members of the joint venture, namely, Williams Brothers. And it subed the entire 300 miles insofar as right-of-way clearing was concerned. Now, Williams Brothers—and probably some more things, [38] too, beside right-of-way clearing; maybe the entire 300 miles of that line, I don't know.

The Court: And Williams Brothers sublet some to Oaks Construction Company?

Mr. Dunn: And Williams Brothers sublet the three hundred miles of pipeline clearing to Oaks Construction Company. That made Oaks a sub-sub.

The Court: And Oaks sublet 100 miles to plaintiff?

Mr. Dunn: Yes, Tope. He chopped it up in hun-

dred mile sections. Now following this, the financial picture here, you have got Williams, McLaughlin and Marwell, joint venture with combined assets that probably would be rather impressive; a subcontract to Williams Brothers, pretty financially stable in and of itself; from them, to Oaks Construction Company, who at that time was pretty well off, not any more but it was then; and then Oaks began to sub to the individuals that actually did the work. There were three of them, your Honor, and in all three cases, the man who headed the job comparable to the one Mr. Tope had was on the payroll. He had a drawing account, as you like to term it, and his men were carried on Oaks' payroll, and it was—it is very common to do that, and the reason is obvious, because these men don't have the money to do it themselves, and they are therefore, and it is common practice, and it is not condemnable; this is not critical of any one of them. They are working on government money. They rely upon what is known as progress payment. As the work progresses, they get paid and [39] usually they don't have enough money to carry their payroll long enough for these progress payments to carry them on through the job. And we can produce and will produce evidence to the effect that Mr. Tope requested this drawing account or this salary, and we can produce evidence and will that the subcontractors standing in Mr. Tope's shoes, and I use him synonymously with Stuart Construction Company, were grateful for being so given a drawing account. They needed it for living

expenses. As Mr. Nesbett said, when Mr. Tope went up there, he didn't have any money. He had to have some money and this is where it came from.

The Court: Of course now if I interrupt you, Mr. Dunn, you tell me but according to Mr. Nesbett, Mr. Oaks not only advanced for his payrolls but dictated who the employees should be, so he said, treated it as if he were not a prime contractor but, that is the subcontractor, but that he was simply employed and that the machinery was there in sort of a rental basis.

Mr. Dunn: It is on such things, your Honor, that issue is joined.

The Court: Exactly. Lawsuits develop your right.

Mr. Dunn: And we don't admit that at all.

The Court: That is the reason I made the suggestion so I would see what your attitude would be.

Mr. Dunn: And——

The Court: In others words now, if I get your contention, Mr. Dunn, is that contract was made and performance bond was all [40] waived and everything of that sort. All these conditions precedent were waived, and that he was operating under the contract, and that you followed the custom here of advancing money for his payroll and that you advanced money to him, and also to his payroll and charged against him on his contract?

Mr. Dunn: I agree with the bulk of what you say except for this——

The Court: Well I am not making a statement. My statement was an inquiry.

Mr. Dunn: Yes, sir, and my answer is "yes" with this qualification: That we do not admit waiving any bond.

The Court: I see. Well, of course, I——

Mr. Dunn: We will produce evidence that we did everything we could to get a bond out of Mr. Tope. Our contention is that we signed a contract calling for a bond.

The Court: Did he ever get a bond?

Mr. Dunn: No, sir.

The Court: Well the contract became effective and outstanding. You all acted upon the contract notwithstanding no bond was given, is that right?

Mr. Dunn: Well, your Honor, the contract was executed and became binding, and we understood that Mr. Tope was going to furnish a bond.

The Court: Yes.

Mr. Dunn: And he didn't. [41]

The Court: Yes.

Mr. Dunn: And we found out about it and we started hounding for it.

The Court: Yes.

Mr. Dunn: We did permit him to go to work but we did so with the understanding——

The Court: That he'd furnish a performance bond?

Mr. Dunn: That he would furnish the bond and even more, that beginning to doubt his ability to get the bond, and Mr. Olday was going to help him do it, and we can show, or possibly Mr. Tope will admit that throughout his presence on that job, Oaks and one of Oaks' representatives was after

him to put up that bond, put up the bond now; if you are thinking along a strict business line, as to the course of activity, I will—by Mr. Oaks whom I represent, in relation to his subcontract, I am going to have admit and possibly agree with you, if you are so thinking, that I don't think he acted too wisely.

The Court: Who's that?

Mr. Dunn: Mr. Oaks. I think he should have been a lot tougher than he was. I think that you'll see that that is not Mr. Oaks' nature but that, of course, is irrelevant.

The Court: The reason I suggested that originally it was an executory contract, and that executory contract provided for a performance or fidelity bond, not given, but the parties nevertheless were going, went on with it, and completed the contract. Well [42] I understand the defendant's claims. There was a default and they took over the contract.

Mr. Dunn: As a matter of fact, we claim, your Honor, that there was a default almost from the beginning because we do not admit the waiving of this bond requirement.

The Court: I see.

Mr. Dunn: Although we did——

The Court: Go on with the work?

Mr. Dunn: Be lenient with respect to the time of posting it and that it is for that that if I had to, and well I am, criticizing Mr. Oaks. He should have called a halt then.

The Court: Did you finally take over because

he did not furnish a performance bond or because the caterpillars broke down?

Mr. Dunn: No, your Honor—the failure to furnish a performance bond became one of many things. We allege, and we believe we can show that Mr. Tope did a very good job of doing a bad job in the course of this work. We feel that he messed.

The Court: He was doing a hard job, I take it is what you had in mind, doing a good job on a hard-to-do job?

Mr. Dunn: No. He did a good job of doing a bad job. In other words he very efficiently performed a poor piece of work, that he did not do a good job.

The Court: I see.

Mr. Dunn: And our allegation is that he broke practically every provision of the contract, and we can show a number of them, [43] and finally it got to the point where finally even Mr. Oaks lost patience. I wish he had lost it long before but that is water over the dam, of course. If you are interested, we will produce testimony that instead of these representatives of Oaks running the job, that they occupied a standard established position on the job, the job being to supervise the work of a subcontractor.

The Court: That is Mr. Tope?

Mr. Dunn: To supervise the work of Mr. Tope.

The Court: Oh, I see.

Mr. Dunn: Now, don't misunderstand that. Not to tell Mr. Tope how to do the work, not to tell Mr.

Tope what equipment he can use, what he can't, what men he can hire, which ones he has to fire; that is not the supervision of which I am speaking, but responsibility for this work goes through the chain of command from the workmen up to the prime contractor that we spelled out before and so a subcontractor must of necessity, oversee the work of the sub-sub to be sure that the work of the sub-subcontractor meets the requirements of the specifications so that the subcontractor in turn can answer to the contractor. And that was the reason for Mr. Crawford being there; Mr. Abbott being there; Mr. Hager being there. And I think as a matter of fact there were a couple more. I don't know. These construction people seem to come and go pretty fast. But that is our answer to——

The Court: Which they would supervise, the results or engineering, but Mr. Nesbett said they not only supervised the results [44] but supervised the means.

Mr. Dunn: I heard him. Now, I would like to make this comment, if I might: In the taking of these depositions, and there are several of them, and in the opening statement of Mr. Nesbett, there was reference and comment of (1), a number of things that I consider relevant, and I want to watch for those throughout the trial of this case.

The Court: I am glad you say that because the issue, as I conceive it, is a very narrow one.

Mr. Dunn: Yes, sir, and even at the risk of emphasizing these matters, as an example, quite a bit has been made of Mr. Tope losing all of his

equipment to the NC Company, Northern Commercial Company, their repossessing it under these lease-purchase——

The Court: Did they repossess it during the operation?

Mr. Dunn: I think the evidence will show Mr. Tope at their request returned it, if you want to distinguish between the two. And mention has been made that here Mr. Tope gave Mr. Bayless a \$3,000.00 check and Mr. Hancock, a representative of Oaks, comes up and tries to get him thrown in jail. Well, now, those are sympathy moving contentions but no such claim for damages is being made.

The Court: Do you think that is what a judge would call an obiter dicta?

Mr. Dunn: I am not a judge. I am not sure if that——

The Court: I didn't say that to display my Latin but——

Mr. Dunn: What I meant was I didn't understand your Latin. [45]

The Court: I said it was an obiter dictum, that is that that was a thing on the side.

Mr. Dunn: Yes, sir. And so to summarize, again, we don't think there is any difference between the corporation and Mr. Tope. We think we paid all the money we are supposed to pay.

The Court: Do I understand, Mr. Dunn, that ultimately there was a—Mr. Oaks declared failure on the part of Mr. Tope to maintain his contract and took it over?

Mr. Dunn: Actually, our contention of what happened is this, your Honor, that we wrote Mr. Tope or Stuart Construction Company and said, "Your are getting this thing pretty well messed up, and if you don't straighten it out, we are going to take over." Now, that may have been followed, I am not certain, by a letter saying "we are taking it over," but, in any event, before we did, Mr. Tope abandoned the project. He just threw up his hands and walked off. That is what we believe——

The Court: That will be your proof?

Mr. Dunn: Yes.

The Court: Very well.

Mr. Dunn: And, your Honor, aside from what is stated in the pleadings, I believe that outlines it fairly well.

The Court: Very well. Now, gentlemen, I think we ought to give the reporter a little rest because she has been taking all that was said. Then, gentlemen, you are ready to proceed with the evidence when we return? [46]

Mr. Dunn: I would—I have one preliminary matter that I would like to go into but with that exception, yes, sir.

The Court: Very well. Let the court stand recessed for ten minutes.

(The court recessed at 3:30 p.m., and reconvened 3:40 p.m.)

Mr. Dunn: Your Honor, before a witness is called, after Mr. Nesbett returns, I have a matter I'd like to bring to the attention of the Court.

The Court: Very well.

Mr. Nesbett: If your Honor please, my first witness will be Mr. Stuart Tope.

The Court: Very well. Counsel, Mr. Dunn says he has a matter he wants to call the attention of the Court to before the witness is sworn.

Mr. Dunn: Your Honor, before we begin to get into the trial of this case, I would like to demand the production of various documents that—I assume I have already seen. I assume I have seen all of them but I would like to have them brought in and marked for identification as soon as possible and those documents are all records of Stuart Construction Company, Inc., for rather—and of Stuart E. Tope, jointly and severally, that relate to this pipeline project. Now that would include books of account, check books, stock books, minute books, any instrument, any record that relates to the claim that the plaintiffs are now asserting.

The Court: That is in connection with this subcontract? [47]

Mr. Dunn: That is right, your Honor. Or if he is claiming outside the subcontract, in connection with that, connection with any claim he is now asserting in this Court.

The Court: Well of any claim here?

Mr. Dunn: Yes, sir.

The Court: Which would have to be within the subcontract?

Mr. Dunn: Well, I am not—here's—inconsistency again, your Honor, I am not sure of that. Is not its first cause of action based on a subcontract?

The Court: Well, the second cause is the same thing, both based upon the subcontract, the alleged subcontract and it is agreed here that there was a subcontract.

Mr. Dunn: It is agreed that there was a subcontract but, your Honor, I don't interpret the second cause of action as dealing with a subcontract, that is a written subcontract.

The Court: Well, it is unless I am unable to construe it.

Mr. Nesbett: Your Honor, the second cause of action is simply a quantum meruit claim.

The Court: And not under the contract?

Mr. Nesbett: Not under the contract, no, sir.

The Court: I see. Well, very well.

Mr. Nesbett: Our position is—

The Court: Very well—I see. Well, then, you want any statement they may have pertaining to either one?

Mr. Dunn: I want all records that deal with either. And, [48] your Honor, I'd like to go farther. The activities of plaintiffs in connection with this cause of action, too, part in the years 1953 and 1954, and I would like to have copies of the tax returns for Stuart Construction Company, Inc., and Stuart E. Tope, for the years ending 1953 and 1954, or should either be on a fiscal basis, fiscal year basis, for whatever fiscal years cover the period beginning December 1, 1953, and ending I think a safe date would be June 1, 1954.

The Court: Those are the two things?

Mr. Dunn: Yes.

The Court: Mr. Nesbett, what do you say about the records Mr. Tope made in relation to this sub-contract either for himself or work that he did or for his company?

Mr. Nesbett: We have no objection to producing those. We have done it.

The Court: What do you say about copies of his tax returns that would be very brief, of the two years?

Mr. Nesbett: We have no objection to that, your Honor.

The Court: Very well.

Mr. Nesbett: As a matter of fact they have all been produced for Mr. Dunn in the past, over a year ago.

The Court: I see.

Mr. Nesbett: And now, your Honor, I would like to make—I have never made any demand from Oaks, but I would like to make the same request of Mr. Dunn on behalf of the Oaks Construction Company [49] in connection with the—yes, with the entire 300 miles of the pipeline that he was concerned with.

The Court: No—the 100 miles.

Mr. Nesbett: Well, Mr. Dunn apparently alleges or intends to prove that the other two operators, that is on the other 200 miles of the line were under the same arrangement. Therefore, I would like, if possible, the records of Oaks Construction Company concerning these other two operators, too.

The Court: You wouldn't want all of the details. You just want——

Mr. Nesbett: That is right but as to the particular Stuart Construction section I would want the same details that Mr. Dunn is requesting.

The Court: Yes. Very well. I think that is a reasonable counter request. In other words, if the other contract is—you don't want the checks and all of the stuff that went on in payment of the individuals. That would be endless here?

Mr. Nesbett: That is true.

Mr. Dunn: Your Honor, I am more than willing to give Mr. Nesbett anything that we can produce here. Most of which I have, I know, have in Court right now. But now, with respect to records——

The Court: Records of the defendant with relation to this subcontract or the employment, if it be such, with Mr. Tope.

Mr. Dunn: Well with respect to records dealing with other subcontract—— [50]

The Court: They're not asking for that. They want to know if it is on the same terms and same basis. They want the original arrangement, I understand. That is all they have asked for.

Mr. Dunn: Well Mr. Nesbett said, as I understood him, he was demanding the same record with respect to the other subcontractors because he understood that I was going to contend that the other subcontractors were working under the same arrangement as Tope. Now I haven't made any such contention, and

The Court: Suppose we let that——

Mr. Dunn: Matter of fact I think that would be irrelevant.

The Court: Suppose we let it go until we get to it—but what he does want though is what your records show with respect to this subcontract.

Mr. Dunn: The 100 miles that plaintiffs have.

The Court: Yes.

Mr. Dunn: That I can give. The other might be a great problem. They're old records, and we haven't dug them out.

The Court: It might be, and we can undoubtedly limit it, and I understand Mr. Nesbett is agreeable to limiting it. And if it does become relevant, I understand you are equipped so you can supply.

Mr. Dunn: I will do my best to supply. I don't know now. When are those to be produced?

The Court: What do you say, Mr. Nesbett? [51]

Mr. Nesbett: I can have the records he requests any time on an hour's notice. They're over in my office.

The Court: Tomorrow morning?

Mr. Nesbett: Yes, sir.

Mr. Dunn: I'll produce mine then. I wanted to use them tonight, your Honor. Now, one thing I particularly am interested in, Mr. Nesbett said I could have already seen these records. The bulk of them, as I said, I believe I have seen but I don't think I saw any stock book, and I'd like to see the stock book of Stuart Construction Company, Inc. I do not believe that was produced.

The Court: You mean for the certificates of stock?

Mr. Dunn: That's right.

The Court: Well of course, is that with the idea of saying whether it was a bona fide corporation?

Mr. Dunn: Yes, sir.

The Court: What do you say about that, Mr. Nesbett?

Mr. Nesbett: I don't know if the stock book would prove bona fide corporation.

The Court: Yes, it wouldn't because it may be a bona fide corporation and they would have no corporation at all.

Mr. Nesbett: He saw the certificates from the auditor which certifies it to be a corporation and went into that thoroughly on the deposition.

The Court: However it would not be of any trouble to produce the stock book. Have you got one? [52]

Mr. Nesbett: I think so, yes, sir.

The Court: There would be no trouble to do that for your inspection.

Mr. Dunn: Or the certificates of stock.

The Court: I take it they will be available; however at this time it doesn't seem to be relevant, except in the case that you want to challenge it is a corporation in good faith. I believe you allege it was not a corporation; it has not complied with the territorial laws.

Mr. Dunn: No, I didn't allege.

The Court: Didn't you do that?

Mr. Dunn: I may have denied their allegation that they did; I am not sure.

The Court: Probably did; that may be that is

where I saw it. I made a very hurried examination of the pleadings.

Mr. Dunn: Now, your Honor, let me make this in the nature of a suggestion and only a suggestion: Now, we have here a claim of Stuart Construction Company; we have a claim of Stuart E. Tope; we have a counter claim of Oaks Construction Company. I am wondering if your Honor wants to outline any procedure to be followed in the course of presenting these various claims?

The Court: No, sir.

Mr. Dunn: Or do you want—when a witness is called, do you want him to testify as to everything he knows as to all three of them? [53]

The Court: All purposes, I think that would expedite the trial, and indicating, however, so that my notes would show—well they would show that anyhow, just from what branch of action he was on. Now, are you ready to produce your first witness, Mr. Nesbett?

Mr. Nesbett: Yes, your Honor. Mr. Tope.

STUART E. TOPE

being first duly sworn upon oath, deposes as follows:

Mr. Nesbett: Before I commence with the examination, I would like to move that all witnesses except parties who are going to testify in this case be excused from the court room.

The Court: What do you say about that, Mr. Dunn?

(Testimony of Stuart E. Tope.)

Mr. Dunn: It is immaterial to me, your Honor.

The Court: Usually where that exclusion order is used for, witnesses scatter and sometimes delayed in getting them back. Now, since there is no objection, are there many witnesses in the court room? Let all the witnesses in this case, in the case of the United States for the use and benefit of Stuart Construction Company, will you stand up, all the witnesses in the case.

Mr. Nesbett: Apparently the only witnesses are my witnesses, your Honor.

The Court: Your witnesses. Do you ask that they be excluded?

Mr. Nesbett: I don't care. That is the situation. It doesn't matter to me.

The Court: What do you say about that, Mr. Dunn. Counsel [54] has asked to excuse the witness and found the other witnesses are his witnesses.

Mr. Dunn: Well, your Honor, he made the request.

The Court: Yes, he made the request.

Mr. Nesbett: I'll stand by it. It doesn't matter to me.

Mr. Dunn: I don't care.

The Court: I am going to enforce rules if counsel on both sides ask for it.

Mr. Dunn: It is immaterial to me once the witnesses are included, I am perfectly willing to go along. If he wants them to remain, but if he has his remain, I don't want mine later excluded.

(Testimony of Stuart E. Tope.)

The Court: Of course you would not want yours excluded, so what do you say now, Mr. Nesbett?

Mr. Nesbett: I think that I should just as soon they be excluded, your Honor, and then——

The Court: Very well, and then somebody will have to check the witnesses, all the witnesses—you who are witnesses in the case. The exclusionary rule has been asked for. That means that it will be necessary for you to retire from the court room but it is my duty to instruct you that you should not talk to—when a witness has testified, you should not talk to him about his testimony. It would be just the same as if you remained here and heard his testimony. The object is to let each witness be independent of the other and give testimony uninfluenced by what the other witness may have said, so that I am going to ask you then not to talk about the [55] case with each other even though now it would not ordinarily be improper for you to do that because if you did it now you would talk to the witness after you came off the witness stand so don't talk to each other about the case at all. You can talk to the lawyers about it; it is their duty to talk to you about the case and about your testimony but now, under the—because of the request, it is my duty to excuse you from the court room but when we are through you may be called in. Will this witness take up the remainder of the afternoon?

Mr. Nesbett: I believe so.

The Court: I will say to you witnesses, you may go to your homes and come back here tomorrow

(Testimony of Stuart E. Tope.)

morning at 10:00 but remain out of the court room until you are called. Is there a witness room here?

Mr. Nesbett: I believe not any more.

Bailiff: We normally provide chairs in the hallway here.

The Court: No, they won't be here this afternoon, so I will ask you to retire from the court room. And you may go to your homes if you want to and come back here tomorrow morning at 10:00 o'clock.

(The witnesses left the court room.)

Mr. Dunn: Your Honor, I have one thing I would like to mention. There is in the court room a Mr. Fred Lynn, the gentleman sitting in the first row here. Mr. Lynn is an attorney from Seattle [56] and he is interested in this case. He would like to sit in on it. It is possible that I would want to call him for a witness. If I did call him for a witness, it would be for the sole purpose of showing what monies a bonding company may have spent in connection with bills incurred by Mr. Tope.

The Court: I would be inclined to make an exception in the case of a lawyer.

Mr. Nesbett: Yes.

The Court: I don't believe a lawyer in the case ought not to be excluded from the court room even though he may be called as a witness.

Mr. Nesbett: I'd just like to ask through your Honor if Mr. Lynn does represent a bonding company or anyone directly interested in the case?

Mr. Dunn: Mr. Lynn is not an attorney of

(Testimony of Stuart E. Tope.)

record in this case. He is representing no one here. He is interested in the case.

The Court: Well then I understand Mr. Lynn may remain in the court room?

Mr. Nesbett: Yes, your Honor.

The Court: Very well.

Direct Examination

By Mr. Nesbett:

Q. Is your full name Stuart E. Tope?

A. It is [57]

Q. How long have you lived in Alaska, Mr. Tope? A. Since '49.

Q. And what has been your business since '49 in Alaska? A. Construction business.

Q. How long have you been in the construction business altogether? A. About 15 years.

Q. What particular phase of the construction business have you been engaged in in Alaska?

A. Well, mostly building.

Q. Now are you—and were you in 1953 president of a corporation known as Stuart Construction Company, Inc.? A. I was.

Q. Is that an Alaskan Corporation?

A. It is.

Q. And is that corporation still in existence?

A. It is.

Q. Have you paid the taxes and filed your statements as required by law for the Stuart Construction Company, Inc.? A. I have.

Q. Now, Mr. Tope, did you—you know Mr. Oaks,

(Testimony of Stuart E. Tope.)

do you not? A. I do.

Q. Is he in the court room now?

A. He is.

Q. Sitting by Mr. Dunn? A. He is. [58]

Q. And how long have you known him?

A. 1951.

Q. Did you have occasion in about November of 1953 to discuss working with or for him in connection with the Haines pipeline clearance job?

A. I did.

Q. Had you had any other dealings in the construction way with Mr. Oaks prior to November of '53? A. I did.

Q. What connection or dealings had you had with him?

A. He leased some cats of mine for his road job at Salano.

Q. And about when in 1953. Was that in '53?

A. That was in '53.

Q. And when in 1953 did that occur?

A. Well it was in the month of July and August, or August and September, somewhere along in there.

Q. Now, what were the first discussions you had with Mr. Oaks in November of '53 about the Haines pipeline job?

A. Well, he said that he was contemplating a—getting a contract for the clearing of the pipeline from Fairbanks to Haines and I believe I asked him, I said if I was going to get cut in on the deal, a little of the work, and he said there were possibilities.

(Testimony of Stuart E. Tope.)

Q. Did you have any other discussions after that one you just recounted? [59]

A. In regards to the pipeline?

Q. Yes, sir.

A. Yes, he told me that he had some cats that weren't in shape to go on a pipeline and he'd like to use mine.

Q. Did he make any proposed use or promise as to how he was to use those cats?

A. Well he asked me to lease them to him at first and I said "no," I wouldn't lease them to him.

Q. And what if anything did Mr. Oaks say then?

A. Well, Mr. Oaks said, well he said "well, maybe we can work up a contract."

Q. Was that in approximately November of '53?

A. Yes.

Q. Did you have, subsequently, talks with him, which resulted in entering into a written contract?

A. Yes, but he wanted a bond and I told him I didn't know whether I could get a bond. I didn't think I could because I had no money.

Mr. Dunn: Your Honor, I object to that as being irrelevant, which, about the only objection I have now in the light of a local ruling to the effect that only counsel who asks the question can object to it as being non-responsive, the answer; the answer was not responsive.

The Court: I thought it was. You may be right. He asked if there was a bond.

Mr. Dunn: He didn't ask him anything about

(Testimony of Stuart E. Tope.)

the bond, [60] your Honor. Will you read the question, please.

(The reporter read the question, Lines 13 and 14, previous page.)

The Court: Now that is all. Did you make no inquiry about the bond?

Mr. Nesbett: I didn't specifically inquire.

The Court: Counsel objected on the grounds it wasn't responsive and of course if that isn't true, made no inquiry about it, the last part was not responsive.

Mr. Nesbett: I think he had reference to a local ruling that is followed here that he himself couldn't object if the answer was not responsive. I have never seen the sense in the ruling anyway so I will abide by your Honor's ruling and go ahead.

The Court: I simply understand he objected on the grounds it is not responsive. You say you have a rule here?

Mr. Nesbett: The only attorney that could object if the answer is non-responsive is the attorney who asked it, and I say I have never seen the sense of it, and I will withdraw the question or permit the answer to be stricken, and I will keep going.

The Court: Very well.

Mr. Dunn: Your Honor, may we proceed with the trial of this law suit without the burden of that local rule that only the attorney who asks the question can object to it on the grounds of not being

(Testimony of Stuart E. Tope.)

responsive. Mr. Nesbett and I agree; neither of us have ever seen any sense to the rule.

The Court: And I believe the rule is as far as that law [61] is concerned that the national—federal government law prevails and this is a matter of a knowledge of objective law. We are bound by substantive law of the territory but the procedure law is defined by the federal government, by the procedure in the federal court, so I think that that would not be the rule, and I will proceed to prevail over the local procedure.

Q. (By Mr. Nesbett): Mr. Tope, do you recognize this document that I am handing you?

The Court: Is that the contract?

Mr. Nesbett: Yes, your Honor.

The Court: December 17th?

Mr. Nesbett: Yes, sir.

A. Yes, sir.

Q. What is it? A. It is a contract.

Q. Is it a copy of the contract of December 17th that has been referred to here by counsel for both sides? A. Yes.

Q. Did you sign that copy that you have in your hands on the last page? A. Yes, sir.

Q. And was it signed by Mr. Oaks on behalf of Oaks Construction Company?

A. Yes, sir. Yes it was.

Mr. Nesbett: And, your Honor, I would like to offer this [62] copy, or the copy that is attached to the complaint.

(Testimony of Stuart E. Tope.)

The Court: Well you better offer that one. These are always dim.

Mr. Nesbett: Yes, sir.

The Court: So as to identify that, we might mark it later but it will be Plaintiff's Exhibit 1 for the plaintiff. 1. Plaintiff's Exhibit 1. What do you say about it Mr. Dunn?

Mr. Dunn: I think I am going to okay it, your Honor, if you will just give me a second please.

The Court: Very well.

Mr. Dunn: I have no objection, your Honor.

Mr. Nesbett: If the Court please——

The Court: Yes, sir.

Mr. Dunn: Now that the signed contract—is it your Honor's ruling that that is now admitted?

The Court: Yes, I would. Two grounds: First, you make no objection and second, I think it is competent evidence. Both sides agree there was a contract.

Mr. Dunn: Yes, your Honor. Now that that contract has been admitted into evidence in the matter, I take it, of the right of Stuart Construction Company, Inc., as being processed towards proof, its right to recover being processed towards proof, after Mr. Nesbett has examined this instrument, I'd like to present it to the Court for two purposes, one tending to impeach the testimony of the witness as already given, and the other, to show the lack of right of [63] Stuart Construction Company, Inc., to present a claim in this court.

The Court: Well, what is your point?

(Testimony of Stuart E. Tope.)

Mr. Dunn: You will see it in one second, your Honor. Mr. Nesbett is examining the instrument.

Mr. Nesbett: Well, I don't quite get at what he has got in mind but I think it is a wrong time to bring it up in any event. Apparently he has a certificate from the director of finance of the territory showing that an annual report was made at a late date and that corporation taxes were paid at a late date for Stuart Construction Company, Inc., and contends as a result that the corporation has no right to recover, or no standing in the court to maintain a suit. Now, whatever merit there is to that claim, I say, it has been brought up at the wrong point in the law suit.

The Court: Sometime along the line; probably it is premature now, if he has no right to recovery, counsel has a right to show that whether in his case or cross-examination here. The contract apparently was signed by Oaks Construction Company by Mr. Oaks and by the Stuart Construction Company by Mr.—by the plaintiff—by the witness, so that both sides recognize that there were two corporations in the contract. Now then, if it has lost its authority and lost its identity, and integrity as a corporation, of course counsel has a right to show that and not be entitled to recovery. In other words, it couldn't contain a suit.

Mr. Nesbett: My only contention is this is not the proper time to attempt to show it. [64]

The Court: That will be my ruling at this time.

(Testimony of Stuart E. Tope.)

Mr. Dunn: It is immaterial to me, your Honor. My thinking is this, that——

The Court: It would save a lot of time if it was not contained, maintain the action, if we knew it now.

Mr. Dunn: That is what I was thinking. If any point is valid the sooner we get it in, the more time we save.

Mr. Nesbett: I don't know if your Honor understood me entirely in my opening statement but I am not trying to recover anything in this case except on behalf of Stuart E. Tope, as an individual, for the reasonable rental value of equipment of his that was used up on that pipeline. That is my only claim here.

Mr. Dunn: Now, will your Honor give me the summary judgment that I asked for?

The Court: That is on the first count?

Mr. Dunn: Yes, sir.

The Court: Well as I understand from you, you are not seeking to claim anything——

Mr. Nesbett: There is only one other possibility when he made the motion that occurred to me, and that is that Stuart Construction Company, Inc., might be entitled to a claim for quantum meruit also and that of course is something that your Honor will have to decide after the case is over, as far as I can see.

Mr. Dunn: Well, your Honor, the only thing I can do there of course is what any attorney would do and scream "surprise" [65] at the top of my

(Testimony of Stuart E. Tope.)

voice, not in the pleadings, wholly outside of the scope, and I am not prepared to defend against such claim.

Mr. Nesbett: Well, your Honor, now I don't think counsel is at all surprised; if he looked at the contract he would see that the total amount that could be earned under the contract could be, would be approximately \$30,000 plus any overage for the \$25.00 for eight hours for the use of cats. We ask for \$53,000.00 in either event and on the ground that we feel that he is entitled to that less proper deductions.

The Court: I understood from you, from your last statement there that your theory here is that Mr. Tope would only be entitled to recover under quantum meruit and that the Stuart Construction Company's case was really out, that you are not going to make any claim on its behalf?

Mr. Nesbett: Only in the event that it might turn out that at the time all the proof on both sides is in that Stuart Construction Company, Inc., itself might be entitled to a quantum meruit claim instead of Stuart E. Tope. That is the only reason I rely on the first cause of action.

The Court: I see.

Mr. Dunn: If the Court please, as I understand Mr. Nesbett, he is saying, he now admits there is no cause of action existing to favor Stuart Construction Company?

The Court: As alleged here?

Mr. Dunn: That perhaps later on, a cause of

(Testimony of Stuart E. Tope.)

action in [66] favor of Stuart Construction Company will appear.

The Court: On a quantum meruit.

Mr. Dunn: If such appears, it will be at that time that it will be up to Mr. Nesbett to move to amend his pleadings in accordance with the proof, and that matter will then be before the Court, but with respect to the present matter before the Court, as I see it, my motion is well taken.

The Court: Well he wants to maintain the Stuart Construction Company as a party here. He doesn't want it out until he can determine whether or not it has any rights, and then I take it he——

Mr. Nesbett: That is all.

Mr. Dunn: I know he doesn't want it out, your Honor, but the only reason he gives for leaving it in is that it may develop that there is a claim and that is to be weighed against his statement that he is not now urging a claim, that the only one that he now urges this Court is quantum meruit on Stuart E. Tope. Therefore as of now, I think my motion is well taken.

The Court: No, sir. Counsel asked me to retain Stuart Construction Company in the case less it might appear later on that the right would accrue to it and I think that is very proper because I won't, wouldn't want to go through here and try a case and put counsel out of Court and then find that he had a right to come back in Court and it may be statute of limitations would run. I don't know, so I think that is a reasonable request and in the interest

(Testimony of Stuart E. Tope.)

of justice, why it may be retained with the idea that he may have to [67] amend.

Mr. Nesbett: Thank you, your Honor.

Mr. Dunn: And your Honor's ruling on this prepared certificate—would you like to see it before you rule on it?

The Court: Well that is it on the basis that Stuart Construction Company has no standing, that is as a corporation?

Mr. Dunn: Yes, sir.

The Court: No, that may be, and if it hasn't why then can't demand for a dead body; if it is dead why it is dead, and if it can't maintain an action here, it can't maintain it later on. In other words if it can't maintain an action, breach of contract, it can't maintain one for quantum meruit.

Mr. Dunn: Well your Honor indicated a moment ago that you thought this certificate might be premature but you also indicated that if my point is meritorious the sooner we got it in, the more time would be saved, and so I am not certain as to what your Honor's pleasure is with respect to the presentation of the certificate.

The Court: I think in the interest of justice and so the case develops, we better leave it as is and I understand that counsel by a statement now says he is only proceeding on the question of quantum meruit.

Mr. Nesbett: That is true, your Honor.

The Court: That would simplify the issues.

Q. (By Mr. Nesbett): [68] Mr. Tope, did you

(Testimony of Stuart E. Tope.)

discuss the matter of the furnishing of a performance and payment bond with Mr. Oaks at the time you signed that contract that you have, Exhibit 1, before you? A. Yes, I did.

Q. What was that discussion?

A. Well I told him in the first place I didn't think I could get a bond.

Q. And was that at the time you signed the contract?

A. Yes, at the time I signed this contract.

Q. What did Mr. Oaks say when you told him that? A. He said "You try to get a bond."

Q. Did you try? A. I did try.

Q. And what attempts did you make to procure a bond?

A. Well I went to two different companies here in town and they knew that I didn't have any money, and I think that that is the reason why that I didn't get a bond.

Q. Which companies did you go to?

A. Well one was Mr. Molitor's company down here. It was established here. I don't know whether he is still in town or not.

Q. And were you required to furnish financial statements in any bond applications you made?

A. Yes, you usually are.

Q. Did you try any other company?

A. There was one other company and they're out of business since [69] that time.

Q. Did you report to Mr. Oaks as to your efforts to get a bond? A. Yes, I did.

(Testimony of Stuart E. Tope.)

Q. And what was the discussion of—

A. Well he called me at various times and asked me if I had got a bond and I told him “no, I didn’t,” and then I did tell him that I was—would try Mr. Olday. He said something about going a bond for me.

Q. And about when was this now with relation to December 17, 1953?

A. Well, this was after December 17th. Mr. Oaks told me that, he says well if I couldn’t get a bond to go on up on the pipeline and go to work and we’d work it out on an hourly basis.

Q. Well now, did you attempt to see Mr. Olday before you went up to work on the job?

A. I can’t recall whether I saw—before the signing of the contract—I saw him after that.

Q. All right. What was the result of your efforts to get Mr. Olday interested in the bond?

A. Well he said that he was going to go outside and that when he had come back in why he would see what he could do.

Q. Now about when—what time of the month, and which year, was that?

A. That was in 1953 in December, I believe.

Q. Well did Mr. Olday come back from his trip outside?

The Court: Mr. who? [70]

Q. Olday. Did you contact him when he came back from his trip outside? A. Yes, I did.

Q. And what was the result of that contact—contact as far as the performance bond was concerned?

(Testimony of Stuart E. Tope.)

A. Well I think he called Mr. Oaks and then I think he went to Molitor's.

Mr. Dunn: Object, as hearsay.

The Court: Of course he couldn't. He says he thinks he called him; he couldn't tell what was said about that.

Q. What was the result? Did you get a bond?

A. No, I didn't.

Q. Did you advise Mr. Oaks that you were unable to get a bond from Mr. Olday?

A. Yes, sir.

Q. Did Mr. Oaks give you any instruction or make any statement when so advised?

A. No, he didn't.

Q. Were you in Anchorage at the time that you advised Mr. Oaks?

A. I believe I was up on the pipeline at the time, at the Tok Lodge.

Q. Did Mr. Oaks give you any instructions—

A. Well he said to keep trying.

Q. Was there any discussion had about your discontinuing work or what your status was on the line? [71]

A. No, he didn't.

Q. Now, did you have any discussion with Mr. Oaks prior to going up to work on the job that you were to be put on his payroll? A. Yes, I did.

Q. Tell the Judge what that discussion was?

A. I told him that I needed some money and I didn't have any to live on, and to go up the road with this equipment, and he said "Well, we'll put

(Testimony of Stuart E. Tope.)

you on the payroll at \$250.00 a week and you'll be acting as foreman."

Q. And did Mr. Oaks do that?

A. Yes, he did. He advanced me one check before Christmas.

Q. Now, where was your equipment at the time you entered into this contract?

A. One piece was in Mr. Oaks' yard here, the terminal yards, and the other piece was at Tonsina.

Q. Where is Tonsina?

A. Tonsina is below Copper Center about twenty miles.

Q. And with relation to Tok Junction, how far is it from Tok?

A. Well I'd say in the neighborhood of 106 miles.

The Court: Is that T-o-p-e Junction?

Mr. Nesbett: T-o-k.

The Court: You told me that once.

Mr. Nesbett: T-o-p-e is the witness.

The Court: Yes. That is right.

Q. Now, did you have any—what other equipment were you to use on [72] that job?

A. Well I was to use three cats.

Q. What type caterpillars were they?

A. D-8's. 8 R series.

Q. And were those your caterpillars?

A. Yes they were.

Q. Had you purchased them in the Alaska area?

A. Yes, sir, in Fairbanks.

Q. From whom did you purchase them?

(Testimony of Stuart E. Tope.)

A. The Northern Commercial Company.

Q. Were those caterpillars entirely paid for at the time you entered into this written contract with Mr. Oaks?

A. No, they weren't.

Q. Had you purchased them under rental, written agreements with Northern Commercial Company?

A. They call it a rental purchase contract.

Q. Do you recognize these documents that I am handing you?

A. Yes, I do.

Q. What are they?

A. They're rental purchase contracts.

Q. And what particular equipment does each contract cover? State it briefly.

A. One, three cats, and a 2½ ton truck.

Q. Were you making payments to Northern Commercial Company on all of those purchase agreements? [73]

A. Yes.

Q. In December of 1953?

A. I didn't make the last payment in '53. No, I didn't have to. I think the last payment was made in November, I believe, or thereabouts—October or November.

Mr. Dunn: Your Honor, I object to this testimony and move to strike it. I don't see the relevancy of it. If Mr. Tope is, as I understand him to be, claiming merely on the basis of quantum meruit, the value of work done, I don't see the relevancy of whether or not he paid any payment to the Northern Commercial Company on these cats.

The Court: I think it would. Quantum meruit

(Testimony of Stuart E. Tope.)

claim would be for the use of these cats, I take it. Now, then, counsel has offered the contract for the cats and asked him about the payments because that would have an influence upon the question of his title.

Mr. Nesbett: The question is what, sir?

The Court: Question of his title, and whether or not they were taken—I understood they were taken away from him. I think title permits you to reserve the right to renew your motion later on.

Mr. Nesbett: I want to offer these in evidence so I won't delay the Court and ask counsel to look over them and I will continue to question him. Mr. Dunn would like to look them over without my continuing to question the witness and I would like to offer them in evidence, and in order not to delay the hearing, I will try [74] and do that after hours or tomorrow with Mr. Dunn, or let him some other time.

The Court: Very well. Will you proceed with the examination.

Q. (By Mr. Nesbett): Mr. Tope, approximately when did you commence work on the Haines pipeline clearing?

A. On the turning, it was started around the 3rd of January.

Q. Were all three of your caterpillars in the area of Tok Junction at the time you commenced work?

A. They were on the line at that time.

Q. Did you have any other equipment there at that time?

(Testimony of Stuart E. Tope.)

A. I had the 2½ ton truck and one pickup.

Q. What type truck was that?

A. It's a 2½ ton Dodge, cab over.

Q. How long had you had that piece of equipment?

A. It was brand new.

Q. And when did you buy it approximately?

A. Sometime in December. I bought it for the pipeline itself.

Q. And from whom did you purchase it?

A. I purchased that from the NC Company on a rental purchase.

The Court: Is that the pickup truck you are talking about?

Mr. Nesbett: 2½ ton fuel tanker.

Q. Did that truck have a fuel tank on it? [75]

A. It had a 500 gallon fuel tank on it.

Q. And what other equipment if any did you have on that job at that time?

A. Oh I—I had the three tractors and the 2½ ton truck and pickup, and I think it was just a week or so after that that I purchased this station wagon. I just can't remember the exact date on it.

Q. What type pickup did you have on the job?

A. Half ton GMC.

Q. Now, did you purchase the station wagon for use on that particular——

A. Yes, I did.

Q. Where did you buy that?

A. Fairbanks.

Q. And now at the time you commenced work in

(Testimony of Stuart E. Tope.)

January of 1954 were there any employees there to run this equipment?

A. They were put there by Mr. Oaks' request.

Mr. Dunn: Objection, your Honor. Same. It is not responsive.

The Court: It isn't. You asked him one question and he answered another. Whether he had any employees on the job.

Q. Were there any employees there to run that equipment? A. Yes, there was.

Q. How many were there? A. Three. [76]

Q. And did you employ any of those people?

A. No, I didn't.

Q. Who did employ them? A. Mr. Oaks.

Q. Who were the employees that were there at the time you commenced work on January 3rd?

A. Well there was a fellow by the name of Morgan and a man by the name of Wilcox, and I can't recall the other man's name.

Q. And did Mr. Oaks employ all three of those men? A. Yes.

Q. Now, was there any other Oaks' employee there on that particular section of the pipeline?

A. Mr. Hager.

Q. And do you know what title he had?

A. He was running the spread, I guess.

Q. What is a spread in the terminology—

A. That is this particular section of the clearing.

Q. Well now, did you know if he had a title with Oaks Construction Company?

A. Well I believe—I don't know whether it

(Testimony of Stuart E. Tope.)

would be a general foreman; that would be about the only thing he could be.

Mr. Dunn: Objection, your Honor, the witness says he don't know and then he continues to answer.

The Court: Objection sustained. He said he didn't know. You are asking about Mr. Hager, is that right? [77]

A. Hager.

The Court: Yes.

Mr. Nesbett: Well if you don't know say you don't know and let it go at that, Mr. Tope. Apparently that will take care of it.

Q. Now, what did Mr. Hager do then around that area? A. He bossed the job.

Q. What do you mean by bossing the job?

A. Well he run the cats and run me and that was it.

Q. Did you attempt yourself to boss the cats and run the job?

A. I tried but it didn't go any good.

Q. In what respect did you try?

A. I was overruled.

Q. Well, how long had you been on the job before you were overruled?

A. Oh not more than a week or two.

Q. And will you tell the Court the first instance of your being overruled?

A. Well I had a sort of a run-in with Mr. Hager and we kind of went to bat, and he ordered the cats back on the berm and started telling them to block the berm down. Then Mr. Oaks came along. I

(Testimony of Stuart E. Tope.)

imagine there was a telephone conversation, but he arrived the next day and——

Q. Who arrived the next day?

A. Mr. Oaks, and he cornered me and told me, he said, “Mr. Hager’s [78] running this end and whatever he says goes. That is it.”

Q. Did you argue with Mr. Oaks about that statement? A. No use of arguing.

Q. Did you tell him that you had signed——

Mr. Dunn: Objection to that last answer, your Honor. Not responsive.

The Court: It may be disregarded, that is that there is no use in arguing.

Q. Did you try to argue with him about that statement? A. Yes, in a way; yes I did.

Q. What did you say?

A. Well I just—I wanted to plow right ahead on it and I was delayed. That is all, and I didn’t think I was getting a fair shake.

Mr. Dunn: Same objection, your Honor.

The Court: Objection sustained. Expression of an opinion.

Q. Can you explain to the Court what a berm is?

A. Well it is a—after they clear it they push it into a pile, a long straight pile.

Q. And is a berm then a pile?

A. Yes. It is debris that they scrape off the top of the ground, trees, bushes, and what have you. They put it over to one side into a berm.

Q. How much footage on each side of that right of way were you supposed to clear?

(Testimony of Stuart E. Tope.)

A. You were supposed to clear a 50' strip with a 30' clean right [79] of way.

Q. And how would you clear that, by scraping the trees and brush to one side?

A. That's right.

Q. Would the berm then be the brush that laid along the line? A. Yes.

Q. What was the nature of this disagreement you had with Hager over the berm?

A. Well we tried—it was almost impossible to get up on top of that stuff and block walk it down.

Q. Get up on top of what stuff?

A. On top of the berm.

Q. After you had scraped it in a pile?

A. Yes.

Q. Why was it impossible?

A. There was snow and trees and they specified, I think, that you had to get it within 18" of the ground and it was just an impossibility.

Q. Why was it impossible?

A. There was too much berm, too much snow.

Q. Well what was the essence or nature of the disagreement you had with Hager?

A. That was it, over this berm, of walking it down.

Q. What did you want to do about it?

A. I wanted to keep on going ahead with it. [80]

Q. Weren't you going to walk it down?

A. A little later on after the snow melted, yes, I would say you could do it.

Q. Let me finish the question before you start

(Testimony of Stuart E. Tope.)

answering it, will you. Now, then, is that when Mr. Oaks was called in to settle this argument?

A. Yes, I believe he was.

Q. All right. Now, did you at any time attempt to hire any employees to run those cats after you started your work up there on January 3rd?

A. Yes, I did.

Q. And whom did you attempt to employ?

A. Mr. Harlan.

Q. And when did that occur?

A. About a week after the job started.

Q. And tell what happened with respect to your attempt to hire Mr. Harlan?

A. Well, there was one of the men in there that wasn't capable and Mr. Hager fired him.

Mr. Dunn: Move to strike it, your Honor, that is an opinion.

The Court: That is one man is not capable. He can say he was fired but if he expresses an opinion then unless it was said by the defendant as the reason, as to the reason why he fired him.

Mr. Nesbett: Would it be greatly objectionable if he [81] stated his opinion in that respect, your Honor. If it is, I don't mind striking it.

The Court: Well if he can tell what the facts are.

Q. What happened then when you attempted to hire Harlan? Just state the facts surrounding it.

A. Well, after this man was off the cats I told Hager, I said "there is a man down there for it, Spot Harlan, that was a good man, very capable,

(Testimony of Stuart E. Tope.)

been up here a good many years," and he says, "You are not hiring no one."

Q. Did you attempt nevertheless to hire Harlan?

A. Yes, I did.

Q. And what happened?

A. They told me that he wouldn't be put on the pipeline.

Mr. Dunn: Objection, your Honor, it is hearsay.

The Court: Well if it was done by someone under the defendant, then it would not be hearsay because it would be coming from the defendant himself.

Mr. Dunn: True, but no such foundation has been laid, sir.

The Court: Well I think up to this time it appears from the evidence that Mr. Hager was a representative of the defendant, worked for the defendant, boss there he said. He was the boss and had charge and full authority there and if he did, why whatever he said would be binding on the defendant.

Mr. Dunn: If he is quoting Hager that would be fine, but I don't know who he is quoting. [82]

The Court: I thought he was; maybe not. This conversation, was it with Mr. Hager?

A. Yes, it was Mr. Hager.

The Court: I thought it was.

Q. Was there a Mr. Crawford connected with that pipeline?

A. He was the general superintendent.

Q. By whom was he employed?

A. By Oaks Construction Company.

(Testimony of Stuart E. Tope.)

Q. Did you ever have occasion to deal with Mr. Crawford? A. Occasionally, yes.

Q. Did you have occasion to talk or discuss the matter of employing Harlan with Mr. Crawford?

A. Yes, I did.

Q. And what was that discussion and what happened?

A. Mr. Crawford said that if there is any hiring to be done, we'll do it.

Q. Now, Mr. Tope, will you describe to the Court generally the type weather and range of temperatures that existed in the area of Tok Junction in the month of January of 1954?

A. The weather would range from 25 below to 67 below.

Q. And were your operations in connection with clearance of the pipeline hampered in any fashion by those kind of temperatures?

A. Yes, it was.

Q. And in what way?

A. Well the extreme cold weather has a tendency to make steel very [83] fracionable, and going over rocky objects, and like that, why it would snap the pads off. I have a one housing. I think I had one housing broken by cold weather.

Q. Were you delayed from doing any work or prevented from doing any work at all for any period of time? A. Yes, I was.

Q. For how long?

A. About, oh, a little better than a week. It was just too cold. They couldn't work when we kept it,

(Testimony of Stuart E. Tope.)

and we kept the cats running twenty-four hours a day for a whole week.

Q. Just kept the engines running?

A. Yes.

Q. But not operating? A. No.

Q. Well now, as you progressed, with your clearance, from Tok Junction toward Big Delta, did you run into any unusual conditions along the right of way? A. Yes, I did.

Q. And will you tell the Court what they were?

A. Very rocky area.

Q. Where was that area?

A. That was at Cathedral Bluff.

Q. And how far was that from Tok?

A. About 12 miles—12 to 14 miles.

Q. What was the nature of that area? [84]

A. Extremely rocky, in very large rocks.

Q. Was there much snow on the ground at that time? A. About four feet.

Q. Well did you have difficulty in that area with your equipment? A. Yes, I did.

Q. Tell the Court what difficulties you had and what happened?

A. Well it was just—when you'd run up against one of these rocks buried in the snow, why it was you'd break something on it like pads. I was always replacing pads on them.

Q. What is a pad?

A. It is a growser on the track of a cat.

Q. All right. Go ahead. Did you have any other difficulties?

(Testimony of Stuart E. Tope.)

A. Then I had one motor blow up on me; a rod went through the side of the motor block.

Q. And did you have any discussion then with Hager and Crawford concerning leaving the particular rocky area and moving to the other end of your clearance line? A. Yes, I did.

Q. And approximately how long after you commenced your work did this conversation or these conversations occur?

A. Would you repeat that please?

Q. About how long after you commenced work on the pipeline did you have these conversations about moving to the other end?

A. Well, possibly three weeks.

Q. And with whom? [85]

A. I had them with Mr. Hager. I asked them to move to an area that was out of Big Delta that was much easier to do and there wasn't rocky——

Q. Did you give him your reasons, why would you want to move? What were your plans?

A. Well it was easier to work and I would get out of that rock pile. I was just knocking my cats to pieces so it was an easier area and I wanted to move up to the easier area and he refused to let me go.

Q. Well were you going to leave the particular area, the rocks?

A. Yes, and come back later.

Q. Come back when?

A. Well, after I would start back the opposite way, just change my location. When the snow is

(Testimony of Stuart E. Tope.)

melted and it was easier to do why then I could have gone through that.

Q. What did Mr. Hager say when you made such request?

A. He says, "You won't move out of this place. You're staying right here."

Q. Did you discuss the same proposition with Mr. Crawford? A. Yes, I did.

Q. And where did those discussions take place?

A. Over the phone.

Q. Where was Mr. Crawford?

A. In Fairbanks.

Q. Did you ever discuss the same matter with Mr. Crawford at the [86] Lodge?

A. I believe he was there at one time and I discussed it with him. I couldn't swear to that.

Q. Did you discuss it with Hager at the Lodge?

A. Yes. I discussed it with Hager at the Lodge, various times.

Q. What did Crawford say about moving out of the rocky area?

A. He said, "You won't move."

Mr. Dunn: Object, your Honor, unless he is—he is relating a telephone conversation now and I believe he'll have to assume that this conversation took place. He is going to have to lay the ground work for identifying the person on the other end of the phone.

The Court: That is that he knew his voice, and——

(Testimony of Stuart E. Tope.)

Mr. Dunn: Either that or he called him at the office.

The Court: Yes. Any of those.

Q. How did you know?

The Court: Was this a telephone conversation?

A. Yes.

The Court: Very well. I think counsel is right, that of course he might have been talking to somebody else.

Q. Mr. Tope, how did you know you were talking to Crawford on the telephone?

A. I called him at his apartment.

Q. Have you ever called him there before?

A. Yes, I have. [87]

Q. Did you know his voice?

A. Yes, I would.

Q. Did the voice you were talking to on that occasion you refer to appear to be Mr. Crawford or sound like Mr. Crawford? A. Yes.

Q. Are you sure it was Mr. Crawford?

A. Only by voice.

Q. Did he discuss the matter intelligently with you as though you had contacted the person that you called? A. Yes.

Q. And what did he say?

A. He said that——

Mr. Dunn: Same objection, your Honor.

A. "You just can't move from up there."

The Court: You say you do object?

Mr. Dunn: Same objection.

The Court: The objection will be overruled.

(Testimony of Stuart E. Tope.)

Q. Now, Mr. Tope, had you had any discussion with Mr. Oaks prior to going up on the job about the payroll for the men who were running your equipment?

A. Yes, I did.

Q. And what discussions were had?

A. I—Mr. Oaks, I told him, I said “I haven’t any money,” and he says “Well, I’ll make the payroll.”

Q. Did you discuss the matter of insurance, workmen’s compensation [88] insurance?

A. I did not.

Q. Did he ever bring the subject up himself?

A. I don’t believe so.

Q. Was there ever any agreement one way or the other as to who was taking care of the matter of insurance, as set out or required in the contract?

A. None at all.

Q. Did you carry any insurance?

A. No, I didn’t.

Q. Mr. Tope, what particular work did you do around the clearance work that was going on?

A. Well, I’d help drive the truck and get it over there and help get the cats greased. I’d chase parts up in Fairbanks.

Q. How far was it to Fairbanks from your scene of operation?

A. About a little better than 200 miles.

Q. And were there any parts available any closer than Fairbanks for those caterpillars?

A. No.

(Testimony of Stuart E. Tope.)

Q. Where would you buy the parts in Fairbanks?

A. At the Northern Commercial Company.

Q. And did you pay cash for them or what were the purchase arrangements?

A. It was put on an open account.

Q. Whose open account? [89]

A. Stuart Tope.

Q. Now, what else did you do in connection with the clearance job?

A. I'd tinker with the cats.

Q. Were you able to repair the cat that you mentioned had the first engine trouble?

A. No, I wasn't.

Q. And about when did that occur?

A. Well it—sometime in February.

Q. Did you ever during the time you were on that clearance job attempt to hire this man Harlan again? A. Yes, I did.

Q. And what was the occasion and about when did you make such an attempt?

A. Well, it was one of the cats had a broken piston and I told him why don't you go up there and fix that cat and he says, "Okay, I'll see," he says, "Who is going to pay me?" and I said "Oaks," and I says "Make your time cards out and I'll turn them into Hager," and which I did.

Q. Where did Mr. Harlan work on the cat?

A. It was out along just before you got to the Cathedral, and——

Q. Is Cathedral the area that you refer to as

(Testimony of Stuart E. Tope.)

being rocky? A. Yes.

Q. And it was extremely cold? You recall the temperature?

A. I would say it was around 40 to 50.

Q. Where did Mr. Harlan have to work on it? [90] A. Right out in the open.

Q. Did he perform the work?

A. Yes, he did.

Q. How long did it take him?

A. About a week.

Q. Did you turn in time cards for him?

A. Yes, I did.

Mr. Dunn: Your Honor, I object again. I was bearing with it for a while but this is—that Latin phrase you used, it is irrelevant.

The Court: Well.

Mr. Dunn: That is as to how cold it was and how poor Mr. Harlan worked a week out in the cold fixing the cat.

The Court: Of course that is important, the question of wages. That is all there is to it but this is just an occasion of trouble, I understand. The machinery was breaking because of the extremely cold weather and the problem he had and the work he had to do in the very cold weather to repair the cat.

Mr. Dunn: If I understand it, the claim that is being asserted here, correctly, and apparently I don't, the only relevant thing would be how many hours these cats worked.

The Court: Well the question here is—there is

(Testimony of Stuart E. Tope.)

a question here; counsel says he is suing on a quantum meruit. The question here is whether or not the contract although apparently in force yet by the operation was abandoned and he says he tried to [91] hire Harlan and I take it they hired him, and he worked for a week and was not paid by Mr. Oaks.

Mr. Nesbett: If counsel wants to stipulate that there never was any contract in effect why we can shorten the trial considerably.

The Court: Well, apparently it was observed in part and disregarded in part. At least that is the way it appears. Anyway the Harlan worked for a week and asked how cold it was, that is not important. He worked for a week and now what about his wages.

Q. Did you turn in time cards for him? I believe was the last question. A. Yes, I did.

Q. To whom? A. Mr. Hager.

Q. And do you know yourself whether Harlan ever was paid for this second bit of work that he performed? A. I don't believe so.

Q. Now, did you ever attempt to hire Harlan on any other occasion while you were on that area of the pipeline? A. Yes, I did.

Q. And what was that occasion and what for, what purpose?

A. Well it was—Mr. Hager had fired one of the men and we used him for—a couple of days to run one of the cats.

Q. And was that his only employment?

(Testimony of Stuart E. Tope.)

A. Well he was later hired at the other end. [92]

Q. But I mean prior to, I mean who hired him at the other end, do you know?

A. I believe that Mr. Crawford hired him.

The Court: Was Mr. Harlan, I understand, was fired at this——

A. He just worked a couple of days but he knew he was going to get paid for it. He just helped out until they got a replacement.

Q. Where did Mr. Harlan live?

A. He lived at the Tok Lodge.

Q. He was available around the job——

A. We lived at the Tok Lodge.

Q. Now, was Mr. Hager ever replaced on that job during the time you were there?

A. Yes, he was.

Q. And approximately how long after you had commenced work was it that Mr. Hager was replaced? A. Six weeks to two months.

Q. By whom was he replaced?

A. By Mr. Abbott.

Q. And do you know yourself who employed Mr. Abbott? A. I do not, no.

Q. Did you ever have a discussion with any other partner of the Oaks Construction Company concerning Mr. Abbott's employment?

A. Yes, I talked to Mr. Noonan.

Q. And was Noonan, Mr. Noonan, one of the partners of Oaks Construction [93] Company?

A. Yes, he was.

(Testimony of Stuart E. Tope.)

Q. Where did you talk to Mr. Noonan and approximately when?

A. In his apartment in Fairbanks.

Q. And approximately when? Did you say Mr. Hager left about six weeks?

A. To two months.

Q. After you had commenced, he had commenced work? A. That is right.

Q. When was, with relation to the time Mr. Hager left, did you talk with Mr. Noonan?

A. I just can't tell you.

Q. Was it before Mr. Hager left?

A. I believe it was.

Q. What discussion did you have with Mr. Noonan about Mr. Abbott?

Mr. Dunn: Objection, your Honor. We got a touchy one here.

The Court: You have got what?

Mr. Dunn: This is a touchy point of evidence. At least it is so as far as I am concerned. As your Honor knows, the whole basis of the rule against admission of hearsay, or one of the main reasons for it, it denies counsel the right to cross-examine. Now, the—however, testimony of a party is admitted freely. It is either advantageous or disadvantageous, either an admission against interest, are self-serving, but now here we have two dead parties. [94]

The Court: Is Noonan dead?

Mr. Dunn: Yes.

The Court: He was a partner, I understand, and of course if he spoke to the other fellows, I think

(Testimony of Stuart E. Tope.)

the dead man's rule would not apply on that situation.

Mr. Dunn: Well the dead man's rule admits the testimony but that is limited to an action against the executor or personal representative, at least under our Alaskan statute it is, and I do not believe that testimony is admissible here.

The Court: Where you mean where there is a dead partner his testimony is not admissible if he made some statement with reference to the partnership?

Mr. Dunn: That is my contention, your Honor, and under our Alaskan statute I guess it is commonly called "dead man's statute" it is to the effect that in an action against a personal representative even an executor or administrator; I imagine it is a common one throughout a number of jurisdictions. I don't know. I practiced only here but when you are suing an executor, the declarations of the deceased are admissible, but that is the only place so far as I know that our statutes mention a declaration of a deceased; no exception is made for.

The Court: That is a case for personal representative here, a statement here, suit against a partnership, and admission was made, if you can recall it, that, by one of the partners who is deceased.

Mr. Dunn: That is what they're attempting to show but our [95] statute says you can show these admissions of a dead person when you sue his representative.

(Testimony of Stuart E. Tope.)

The Court: Well of course that is where the action is against the dead man.

Mr. Dunn: And it stops there?

The Court: Yes.

Mr. Dunn: And that throws you, according to my reasoning, into the rule that it mentions that one excludes the other, includes the other.

The Court: The courts uniformly held. I don't want to put it too strongly. Then what you and I are calling a dead man's statute that dead man may bind where he acted for somebody else, and in this case, he was acting for the partnership, and not for himself. In other words he is not sued here but the partnership was sued, of which he was a partner. Now the question is and of course there is no question, but that he had bound the partnership now that he is dead, whether or not what he said after he was dead would bind the partnership, and that it is not only binding but whether or not what he may have said in his lifetime could be elicited and brought out before the Court.

Mr. Dunn: That is the point. There is no question but what Noonan could bind the partnership in the ordinary course of his business but the question is whether or not what Noonan said to that end is now admissible in the light of the dead man's statute, and the principle behind the hearsay rule. This clearly [96] deducts the hearsay rule. There is no way in the world, at least nobody has found it yet, to cross Mr. Noonan. He can say whatever he wants to say.

(Testimony of Stuart E. Tope.)

The Court: That will be my ruling, Mr. Dunn, at this time. I will take occasion to examine the statute. It is my judgment that the dead man's statute of the Territory is such substantive law as to binding upon us. At the present time there is no jury here. I'll admit the testimony and then if it appears that I made a mistake, you can ask to be stricken out and I, myself, will examine the statute. I am eager to see what provision is made in the statute to what we call the dead man's—that is what the dead man statute is here.

Q. Did you have a discussion with Mr. Noonan in Fairbanks then in his hotel room? Was that your testimony? A. Yes.

Q. Was—who else was present at that discussion?

A. Mr. Crawford was there at one time that I was there.

Q. And was that the occasion that Mr. Abbott was employed to come down to that section of the pipeline and work?

A. Mr. Noonan said that Hager was going to be replaced by Mr. Abbott.

The Court: Now, at the disposition of the dead man statute question here was that said in the presence of Mr. Crawford?

Q. Was Mr. Crawford present?

A. I couldn't say whether he was there at that time or not. [97]

Mr. Nesbett: This is really not important enough to take a lot of the Court's time on. If there is any

(Testimony of Stuart E. Tope.)

doubt in your Honor's mind about it, it appears to me the dead man's statute Mr. Dunn refers to has nothing whatever to do.

The Court: That is my notion now, that it doesn't but of course we are bound. I think that is not the procedure; sometimes the procedural act has the force of a substantive law; that is true of trying under the laws of Illinois now. It is substantive law the courts have said and not a procedural matter, so I think that where the courts have divided the competency of witnesses—I mean where the legislature has the competency of a witness, I think that is a matter of substantive law and as I said, I think we should go on, that is if you want to go on with it, and if later on it appears that we made a mistake, why we can correct it.

Q. Mr. Tope, did you continue to work on the pipeline after Mr. Abbott had replaced Mr. Hager?

A. Yes, I did.

Q. And did you perform—what duties did you perform? Was there any change in your routine?

A. None.

Q. Did Mr. Abbott run the job in the same fashion Mr. Hager had? A. Yes, he did.

Q. And how long was Mr. Abbott there?

A. Until the completion.

Q. Was he there as long as you were on the job? [98] A. Yes, he was.

Q. And subsequently too? A. Yes.

Q. Were you able or rather, I'll ask you this: Did Mr. Abbott direct the drivers of the caterpillars,

(Testimony of Stuart E. Tope.)

your caterpillars that were working there in the clearing? A. Yes, he did.

Q. Were you able to direct the men yourself or did you attempt after your——

A. I didn't make no attempt, no.

Q. Now, Mr. Tope, after your first caterpillar—I believe you said the first one became or was broken down in February of 1954. Was that cat ever replaced by any other cat that you owned?

A. No.

Q. Was any other caterpillar brought in on the job to your knowledge? A. Yes, there was.

Q. And do you know which come, or who owned that caterpillar and who caused it to be brought in on the job?

A. Well there was one brought in from Mr. Oaks and one brought in from Rogers and Babler Construction Company.

Q. And did Mr. Oaks or Mr. Crawford or Mr. Abbott consult you about bringing the cat in say from Rogers-Babler Construction Company?

A. He did not. [99]

Q. When did you learn that such a cat had been brought to the job? A. Saw it on the job.

Q. And did Mr. Oaks consult with you about bringing one of his cats in?

A. No, he did not.

Q. When did you learn that that had occurred?

A. I saw it come up the road and saw them unloading it.

(Testimony of Stuart E. Tope.)

Q. Now, during the time you were on that clearing job, were any other cats brought in to work on the clearing? A. Yes, there was.

Q. How many and if you know who furnished them?

A. There was three and they were furnished by McLaughlin.

Q. McLaughlin Construction Company?

A. Construction Company, Inc., I guess.

Q. And were you consulted by Mr. Oaks or Mr. Abbott or anyone connected with Oaks Construction Company about those cats being brought in?

A. No, I wasn't.

Q. When did you first learn that they had brought them in?

A. Well they said they were going to bring them in and they did.

Mr. Dunn: Your Honor, it seems to me that that, this is indicative of—difficulty in leaving these causes of action dangling here, when he claims that he is interested in asserting only the cause of action of quantum meruit. If he has asserted and trying to prove only quantum meruit, then if there were a hundred other cats on that job, it is immaterial to this law suit. [100]

The Court: Well I think that counsel's effort is to get away from this contract, and that is the proof, trend of the proof, as I see it now, so as to establish any claim here on the basis of quantum meruit. In other words he is not suing on the contract but the contract is here and it is in evidence, and counsel

put it in evidence. The parties had signed it and apparently part of the time they acted upon the contract.

Mr. Dunn: I understand, your Honor. I have been missing your point. I see what you are thinking. I apologize. Excuse me.

The Court: That's all right. Now, gentlemen, would it be all right to suspend now. It is 5:00 o'clock.

(The court recessed at 5:00 p.m., August 11, 1958.) [101]

The Court: Gentlemen, are you ready to proceed?

Mr. Nesbett: Yes, your Honor.

Mr. Dunn: Yes, your Honor.

Mr. Nesbett: Your Honor, I have what I believe are all the records that Mr. Dunn requested in connection with Stuart Construction Company, Inc. I understand that he is going to produce some, if not all, of the records that I asked for in connection with Oaks Construction Company.

The Court: Yes.

Mr. Nesbett: In order not to delay the trial of the case, I suggest, if it is agreeable with Mr. Dunn, that we might make those records available to each other here in the court room, say between one and two?

The Court: I think that is a very good suggestion.

Mr. Dunn: I would like to have those records marked for identification.

The Court: Well, in advance of your examina-

tion—I understand they're available for you; they have to be marked if they are used in evidence, but I see no benefit to you if they're made available for you to examine.

Mr. Dunn: I do, your Honor. The reason— [103] here are two reasons. One is due to a recent hassle with Judge Fee in the Circuit Court; I became very record conscious. The other one is this: I don't suppose your Honor has read the depositions that have been filed.

The Court: No, sir, I haven't.

Mr. Dunn: When I took Mr. Tope's deposition, I went over these records and I had a very difficult time with Mr. Tope, and as that deposition will reveal, at least the way I interpreted it, there is some intimation there by Mr. Tope, to the effect that I might have taken some of those records, and the only way I could establish what records were actually produced was to direct my questions to Mr. Nesbett, who was more than willing and did cooperate with me. But that is the reason I want them marked for identification; I don't want any further question on it.

The Court: I see. Well, they're in your hands, very well. Any reason, Mr. Nesbett?

Mr. Nesbett: I don't even recall any such occurrence, but if we marked all the records that I have brought here for identification, it's liable to prolong the trial for I don't know how long. It seems to me, your Honor, he has gone over the records, entirely, once in Tope's deposition. [104]

The Court: Have you a list of what you are turning over to him?

Mr. Nesbett: I didn't intend to turn anything over to him; I intended to make it available to him here.

The Court: Under those circumstances, Mr. Dunn, it would not be necessary to mark them; it may be that you won't want to use them at all. And, of course, when they're used, the observation is not only to make outside of the Court, but the reason for identifying the documents for use in the Court. And usually where you know what the document is and you know it is identified because of its peculiar nature, it is not necessary to mark it at all. However, it is the practice to mark them all. Now then, the very fact that you have some misgiving about what might be charged against you, they're examined here, the attorneys are all together, why there could be no question about it, so I don't want to take the time now. If you were to mark them all under one cover, why some of them could disappear, so apparently it will take a lot of time to mark each one separately.

Mr. Dunn: Your Honor, I am afraid it will too, because they are voluminous records, but—there is no question at all but what, at least, a number of Mr. Tope's records are going to be offered for evidence. [105]

The Court: When they are, why they can be marked.

Mr. Dunn: If he doesn't offer them for identification, I will.

The Court: Well, then you can mark them as your exhibits.

Mr. Dunn: And the same, of course, will be true of a number of mine and I am most hesitant—they're going to have to——

The Court: The point I make, Mr. Dunn, I do not want to mark a lot of exhibits that merely may not be used in evidence; when they are used and when they are presented in court, why then they will be marked, but to simply, for the use of counsel on something that is speculative, I don't want to take the time of the court to mark the exhibits that may not or may be used in court.

Mr. Dunn: Well, we are not premature, your Honor, I am going to need them to cross-examine Mr. Tope.

The Court: When you do, you ask for them and identify the exhibit and cross-examine him about it. Are you ready to proceed, gentlemen?

Mr. Nesbett: Yes, your Honor.

(Whereupon Mr. Tope resumed the stand.) [106]

The Court: Is he still on direct examination?

Mr. Nesbett: Yes, your Honor.

(Testimony of Stuart E. Tope.)

Direct Examination

By Mr. Nesbett:

Q. Mr. Tope, can you describe to the Court approximately the distance and miles that this rock pile area existed that you described yesterday in your testimony?

A. Well, it run from about twelve to fifteen miles from Tok on north.

Q. I say, can you tell the Court approximately in miles how far that rocky area extended—how long was it?

A. Well, I imagine it was there around fifteen miles of it.

Q. Now, approximately when during the year 1954, did you get through that rocky area?

A. Shortly after February, I think it was around in March, early part of March.

Q. And were all of your cats in operation by the time you got through the rock pile?

A. There was. I believe there was just one left.

Q. And where?

The Court: What do you mean, just one cat, one Caterpillar left?

A. One tractor.

Q. You mean by "left"—what do you mean by "left"?

A. I had three and there was two out of commission and there was one remaining. [107]

Q. Where were the two that were out of commission?

(Testimony of Stuart E. Tope.)

A. One was at—one had already been taken back to Fairbanks and one was sitting at the Robinson River.

Q. And what, briefly, was wrong with the Caterpillar that had been taken to Fairbanks?

A. Well, that is the tractor that had a rod bearing through the side of the motor block.

Q. And what had happened to the other caterpillar that was sitting near Robinson River?

A. Due to extreme cold weather that they have, weather checks in the journals of the crankshaft would eat out the bearings.

Q. Well, is that what had happened to that Caterpillar that was sitting at the Robinson River?

A. That is right.

Q. Did you during the time clearance work was being done on that area, ever get either of those two Caterpillars back into operation?

A. One I did.

Q. And which one did you get back into operation?

A. The one that was at Robinson River.

Q. And did you get that Caterpillar back in action in time to do any work on the clearing?

A. I did not.

Q. Then, of the remaining Caterpillar that was in use after [108] you had gotten through the rock pile, how long was that cat used in clearance work on that job?

A. To the completion.

Q. And when was that cat last used on the job?

A. I believe around May 1st.

(Testimony of Stuart E. Tope.)

Q. Now, did you have anything to do with the three Caterpillars you testified concerning yesterday that were rented from McLaughlin Construction, Inc., and brought up to Big Delta to work backward on the line? A. No, I did not.

Q. Do you know who was in charge of those Caterpillars? A. Mr. Abbott.

Q. And was there anyone else specifically in charge of the Caterpillars at the area they were working in? A. Mr. Allred.

Q. Did you have anything to do with Mr. Allred being on the job and running those cats?

A. I did not.

Q. Generally, how did Mr. Allred operate with his cats? What did he do and in what direction did he work on the line?

A. Well, he was working south of Big Delta toward Tok.

Q. Would that be in the general direction of toward where you were operating?

A. Yes. [109]

Q. Where your cats were. Now, when to the best of your knowledge did Mr. Allred and those three Caterpillars come on the job?

A. When did they come on the job?

Q. Yes.

A. Sometime in March, I just couldn't tell you the date.

Q. Now, did those Caterpillars eventually work up to the area where your cats were working northerly? A. Yes.

(Testimony of Stuart E. Tope.)

Q. Now, Mr. Tope, did you use a 2½-ton Dodge fuel truck on that job? A. Yes, I did.

Q. Between what dates was that truck used on the job? When did you first—

The Court: Did you call it a fuel truck?

Q. It is a 2½-ton Dodge fuel truck.

The Court: Yes.

A. It was used in December, the 25th or after the 25th, up until May 1st.

Q. And generally, how was it used?

A. Well, it would distribute the fuel to the tractors. It would haul the grease guns and the oils and lubricants for the tractors.

Q. Was that truck used every day that the Caterpillars operated on the line? [110]

A. Every day.

Q. And do you know from your experience in construction what the reasonable rental rate on such a truck is per month?

A. On a new piece of equipment, which it was, brand-new, that—for that piece of equipment it would run anywhere from five hundred to one thousand dollars a month.

Q. And assessing your charges for rental here, you have assessed eight hundred dollars for it per month, for that equipment. Do you consider that a reasonable rate for that type of equipment in that year? A. I do.

Q. And the Ford—1948 Station Wagon, when did you first commence to use that piece of equipment on the pipeline clearing job?

(Testimony of Stuart E. Tope.)

A. In January, but I just can't tell you the date.

Q. Did you testify yesterday that you bought that approximately a week after you commenced operations? A. Somewhere in there, yes.

Q. And was it put into use on the pipeline clearing job immediately? A. Yes, it was.

Q. Was it used throughout the time you were on the job?

A. I used it for going for parts and transporting men, yes.

Q. Did anyone else use that station wagon besides yourself in the clearing job? [111]

A. Mr. Abbott used it and Mr. Allred used it.

Q. For what purpose would they use it?

A. Being foreman on the line, the pipeline; they would go back and forth along the right of way checking over the job.

Q. In assessing a rental rate on that piece of equipment you have charged two hundred and fifty dollars per month; do you consider that a reasonable rental for that type equipment in 1954?

A. I do.

Q. Now, can you state when you first commenced to use the GMC pickup, which you state was on the job and in use in connection with the clearing?

A. From the very beginning.

Q. And that would be in December, would it, or January 3? A. In December.

Q. And what model pickup was that? What year—what model was it? A. 1952.

(Testimony of Stuart E. Tope.)

Q. And did that belong to you personally?

A. Yes.

Q. In assessing a rental rate of two hundred and fifty dollars per month, do you consider that a reasonable rental rate for the year 1954, for that model and type of equipment? [112]

A. I do.

Q. Did anyone connected with the clearance job use that equipment besides yourself? A. Yes.

Q. Who and what occasions, generally?

A. Well, it was used for various things, various people used it; I could name a couple of them.

Q: I ask you to name them.

A. Vince Abbott and Mr. Allred.

Q. And what would the purpose of their use be?

A. Going up and down the pipeline.

Q. Was that equipment on the job until May 1 of 1954? A. It was.

Q. Do you recognize this document, Mr. Tope?

A. Yes, I do.

Q. What is it, sir?

A. It's a statement prepared, a cost statement prepared by Wayne Hubbard.

Q. Who is Wayne Hubbard?

A. He is an accountant here in Anchorage.

Q. And what does that statement purport to show?

A. Well, it shows the cost of operation per piece of equipment.

Q. Did you furnish Mr. Hubbard any records to use in the preparation of that document? [113]

(Testimony of Stuart E. Tope.)

A. I furnished him invoices from the Oaks Construction Company.

Q. And generally, what was the nature of the invoice—for what was the purpose of the invoice?

A. The purpose of the invoice was for the men's time and what it would cost to operate the piece of equipment.

Q. Now, what equipment is listed there in that document prepared by Mr. Hubbard?

A. Well, there is one Caterpillar tractor, S 23, and one Caterpillar——

Q. Is that one of the Caterpillars you owned and it was on the job there?

A. That's right.

Q. And what else?

A. There's a Caterpillar, S 22.

Q. And that is likewise a Caterpillar owned by you and on that clearance job?

A. That is right.

Q. Now——

The Court: What is the number of the first Caterpillar?

A. S 23.

The Court: The last one you named was what?

A. S 22. [114]

Q. And were there any other Caterpillars, or were there any others shown on that list?

A. S 24.

Q. Now, does that document prepared by Mr. Hubbard show the cost that would have accrued in order to run that cat on the pipeline clearance

(Testimony of Stuart E. Tope.)

job for the number of hours claimed by you as compensation? A. That is right.

Q. What was the reason for making that cost of operation sheet?

A. To get the cost per piece of equipment.

Q. Are you claiming a rental rate, a reasonable rental rate on those Caterpillars that belong to you at twenty-five dollars per hour for every hour they operated on the clearance job? A. Yes.

Q. How did you determine the number of hours that each cat operated on the job?

A. Taken from the invoices of Mr. Oaks.

Q. Were those payroll invoices forwarded by the Oaks Construction Company to you during the clearance period? A. That is right.

Q. And how did you use those payroll invoices in order to determine the number of hours each Caterpillar had been operated? [115]

A. By taking the man that was operating the piece of equipment at the time.

Q. In other words, your knowledge of who was running that equipment and the number of hours of wages paid to him determined how many hours that cat had been run. Is that your testimony?

A. That is correct.

Q. Now, does that cost of operations reflect other costs in connection with running the Caterpillars, such as fuel, lubrication?

A. It takes in fuel and lubrication, this statement here (indicating), yes.

(Testimony of Stuart E. Tope.)

Q. How was the fuel consumption estimated or calculated as to each Caterpillar for the hours run?

A. Well, they have a—repeat that please?

Q. How was the fuel consumption for each of the Caterpillars calculated?

A. From the number of hours that the cat was used on the job.

Q. Well, was a figure assigned as an hourly consumption? How did you arrive at a figure as to daily consumption or total consumption?

A. Well, it was paid on forty gallons per day per piece of equipment.

Q. And was that a figure given by you to Mr. Hubbard to [116] use in preparing that cost of operation? A. Yes, it was.

Q. Is there an item on that cost of operations entitled, “Lubrication, Prestone, and so forth”?

A. Yes, there is.

Q. And what is the Prestone?

A. It's an anti-freeze used in the radiators of the tractors.

Q. And how did Mr. Hubbard calculate the cost of anti—Prestone supplies to each Caterpillar, in preparing that cost of operation sheet?

A. Well, from invoices I had received from Mr. Bayless.

Q. Now, did you make any allowance or calculations in connection with extremely cold weather where Caterpillars would run twenty-four hours per day? You testified that existed for about one week? A. Yes.

(Testimony of Stuart E. Tope.)

Q. What fuel allowance was made for that week?

A. There was a straight twenty gallons a day.

Q. Per Caterpillar? A. Per Caterpillar.

Q. Now, in your opinion, does that cost of operations, or do those costs of operation sheets reflect the cost that would have been incurred by you in furnishing those cats to an operator or user at twenty-five dollars [117] per hour, if you yourself had paid the salaries, withholding taxes, fuel, repairs, and the miscellaneous lubrication?

A. That is correct.

Q. Then, is the total of that cost of operations, a figure that should be deducted from your total rental claim in this case? A. Yes.

Q. Other than your calculations for fuel consumption per hour on Caterpillars, were the records furnished you by Oaks Construction Company used entirely to prepare that cost of operation sheet?

A. That is right.

Q. Your Honor, I would like to have this marked for identification, at least—well I will offer it in evidence, if Mr. Dunn objects, why he can—

Mr. Dunn: Your Honor, of course, I have no objection to its being offered for identification. As to whether or not—I want to object to admissibility in evidence; I want some time to study it.

The Court: I think that is a reasonable request, you should have time to study it.

Mr. Nesbett: I will give Mr. Dunn a copy, Your Honor.

(Testimony of Stuart E. Tope.)

The Court: What is the marking? [118]

The Clerk: It is Plaintiff's Exhibit 2.

Mr. Dunn: For identification, is that correct?

The Court: That's right. Now, tell me, does it contain the type of deductions of the cost of operation from the total rental charges, or have you got that on a separate sheet?

Mr. Nesbett: No, Your Honor, it doesn't show it on this sheet.

The Court: You have it on a separate sheet, I assume?

Mr. Nesbett: I have not prepared a sheet, but I can before the conclusion of this trial.

The Court: Well it's all right if the witness has gone over it and made the computations. Have you made a computation?

Mr. Nesbett: I have personally, yes; I mentioned it in my opening statement.

The Court: Yes, you did, I made a memo of it.

Q. (By Mr. Nesbett): Mr. Tope, do you recognize that document? A. Yes, I do.

Q. What is it? A. It's a statement.

Q. A statement of what? [119]

A. This is from the rental on the equipment and was calculated as follows on it: 21½-ton truck and Ford Station Wagon and GMC pickup.

Q. Is that a statement of the total rental costs broken down as to each piece of equipment used on that pipeline clearance job of yours?

A. That's right.

Q. Was that statement furnished to Mr. Dunn

(Testimony of Stuart E. Tope.)

at his request as made during the taking of a deposition? A. That is right.

Q. Does that statement reflect the total rental demand that you are making in this case, and broken down roughly as to each piece of equipment?

A. Yes, it does.

Q. Your Honor, we would like to offer this.

The Court: That it the total rentals less the cost, is that the way——

Q. This would be the total rentals. This would be the other exhibit for identification, it would be the cost deduction that he made from this.

The Court: I see, a cost deduction was not made on this sheet?

Q. No, sir.

Mr. Dunn: It's a true copy, Your Honor.

Mr. Nesbett: I should like to offer it in [120] evidence, your Honor, to illustrate the witness' testimony.

The Court: You are marking the exhibit 3, is it?

Mr. Nesbett: Exhibit 3.

The Court: You are offering it in evidence. What do you say, Mr. Dunn?

Mr. Dunn: Nothing, Your Honor.

The Court: Very well. It may be received in evidence.

Q. (By Mr. Nesbett): Do you recognize any of these documents?

Mr. Dunn: Your Honor, while he is looking that over, I meant to suggest this earlier, I don't recognize anyone in the courtroom, but I wonder

(Testimony of Stuart E. Tope.)

if it wouldn't be wise to repeat your request concerning the exclusion of witnesses at the beginning of each day; none of mine were here to hear it.

The Court: Are there any witnesses in the courtroom in the case of United States of America for the use of Stuart Construction Company and Stuart E. Tope against Carl E. Oaks and others? Any witnessess in the courtroom? No answer, I take it they are not here.

Q. (By Mr. Nesbett): Do you recognize those, Mr. Tope? [121] A. Yes, I do.

Q. What are they?

A. They're rental agreements with an option to purchase.

Q. Made with whom and by whom?

A. The Northern Commercial Company, Fairbanks.

Q. And with whom? A. Pardon?

Q. Northern Commercial Company's agreement with whom? A. With Tom Downs.

Q. Now, who is the other party to that contract?

A. Stuart E. Tope.

Q. Did you enter into those agreements with Northern Commercial Company yourself as an individual? A. Yes, I did.

Q. Do they cover the Caterpillars and Dodge truck that you testified were used on this pipeline job? A. Yes.

Q. Are those the original of the agreements?

A. Yes.

Q. Your Honor, I will offer these in evidence

(Testimony of Stuart E. Tope.)

in place of the copies that I offered yesterday. There are four.

The Court: Four of those contracts?

Q. There are five, Your Honor, one is a separate piece of equipment. [122]

The Court: Does it cover each piece of equipment that was used on this job?

Q. Yes, Your Honor.

Mr. Dunn: I would like to have, and I assume it can be readily done, the witness identify these as the equipment that was used on this particular project. And also, I assume it being the same equipment to which he has previously referred.

The Court: Counsel just answered that question and said it is.

Mr. Nesbett: I asked him that.

The Court: As I understand, Mr. Nesbett, we have your assurance that it covers the exact equipment that was used on this job?

Mr. Nesbett: Yes, Your Honor, and I asked the witness, "This is the equipment you used on the pipeline clearance, isn't it? A. It is. Q. That you have been describing it? A. It is."

Mr. Dunn: May I request him, ask him a question?

The Court: Yes, you may.

Mr. Dunn: Is this the same equipment that you previously been talking about, Mr. Tope?

A. The tractors?

Q. You previously discussed equipment that you used on the [123] pipeline job. Now, is that equip-

(Testimony of Stuart E. Tope.)

ment the same as the equipment which is the subject of these agreements?

A. Three tractors, the rear-end control unit, and a 2½-ton Dodge truck, yes.

Q. The answer is "yes"? A. Yes.

Q. Thank you.

The Court: Now, you can mark those all as one exhibit.

Mr. Nesbett: They can be if no one has an objection.

The Clerk: Four-one to three, four, five. (4-1, 4-2, 4-3, 4-4, and 4-5.)

Mr. Dunn: I think the easiest way, I would like to know which one is 4-1, and so on?

Mr. Nesbett: Possibly it might be easier if you gave the Caterpillar number furnished——

The Court: When you get it, it will be marked on the document, Mr. Dunn, so you will be able to identify it then. I take it each document separately just describes each piece of equipment.

Mr. Nesbett: It does, yes, sir.

The Court: Well then, it will have a marking. Their markings are exhibits, plaintiff's exhibits 4-1, 4-2, 4-3, and 4 and 5. [124]

The Clerk: Do they come in number, or how are they, in rotation? Are they by date, or——

Mr. Nesbett: I had them in no particular order there.

The Court: I do not think that is important; the question is here that they are identified as 4-1,

(Testimony of Stuart E. Tope.)

4-2, 4-3, 4-4, and 4-5. You probably purchased them at different times in the contract?

A. Yes.

Q. (By Mr. Nesbett): Were those purchases made roughly between the months of June of 1953, and August of 1953? A. Yes.

Q. With the exception of the Dodge truck, is that right? A. Yes.

Q. When was that purchase made?

A. That was purchased in December of 1953.

Q. All those contracts which are Exhibits 4-1, 2, 3, 4, and 5, were entered into with Northern Commercial Company by you as an individual, were they not? A. They were.

Q. Did——

The Court: May I inquire, was a bill of sale ever given to the corporation? Was it ever transferred to the corporation? [125]

The Court: Very well.

Mr. Nesbett: "Letter heading of Oaks Construction Company, Box 1452, Anchorage, Alaska, Polaris Building, Anchorage, Alaska," as the righthand origin address. "March 22, 1954, Dot Lake Lodge, Alaska. Gentlemen: Since you have not complied with Article 17 of your sub-contract and the Oak Construction Company's letter of 27th of February, 1954, with regard to furnishing performance and payment bonds for your clearing contract with this Company, you are hereby notified that unless you secure and give notice to this Company, that you have secured these bonds by 26th of March,

(Testimony of Stuart E. Tope.)

1954, the provisions of Article 15 will be enforced and the Oaks Construction Company will take over your work and complete same at your cost and expense. Very truly yours, For Oaks Construction Company, Roy S. Crawford, General Superintendent, signed: Roy S. Crawford."

Q. Mr. Tope, I will ask you when you received this letter? Would it have been several days after the date of March 22, 1954?

A. Yes, it would.

Q. Now, was Mr. Allred operating the three McLaughlin Company cats on the other end of the clearing line as of the time you received this letter? [126]

Q. Mr. Tope, did you ever transfer this equipment to Stuart Construction Company, Inc.?

A. I did not.

Q. Now, what is this document, if you know? What is it, Mr. Tope?

A. It's a letter to the Stuart Construction Company.

Q. From whom?

A. From the Oaks Construction Company.

Q. And the date, sir?

A. The date is March 22, 1954.

Q. Was that letter received by you?

A. Yes.

Q. And is it signed by anyone connected with Oaks Construction Company?

A. By Roy S. Crawford.

(Testimony of Stuart E. Tope.)

Q. Your Honor, I'll offer this letter into evidence.

Mr. Dunn: May I have a minute, please?

The Court: No objections?

Mr. Dunn: No, sir, I voice them when I have them.

The Court: Very well, the Court just made inquiry. It's marked and you offer it in evidence.

The Clerk: This will be 5, Judge Reeves.

Mr. Nesbett: Your Honor, this is a very short letter and I would like to read it to—— [127]

A. Yes.

Q. Was the Rogers & Babler rented Caterpillar also working on the job at the time you received this letter? A. Yes.

Q. How long prior to the date of this letter, March 22, to the best of your knowledge, had the Rogers & Babler cat come on the job?

A. Around the first of March.

Q. And did you testify that the Allred spreader, the McLaughlin cats came on early in March to the best of your knowledge? A. Yes.

Q. Did you make any reply to the Oaks Construction Company after you received this letter?

A. No; I didn't.

Q. Do you recognize this paper?

A. Yes; I do.

Q. What is it?

A. It's a letter from the Oaks Construction Company.

Q. What is the date?

(Testimony of Stuart E. Tope.)

A. 16th of April, 1954.

Q. To whom is it addressed?

A. To the Stuart Construction Company.

Q. Is it signed by anyone connected with the Oaks?

A. It is signed by Carl E. Oaks. [128]

Q. Your Honor, I'll offer this in evidence.

The Court: Plaintiff's Exhibit 6?

The Clerk: Yes.

Mr. Nesbett: Your Honor, I should like to read this letter.

The Court: Very well.

Mr. Dunn: Excuse me one second, Buell, while you are doing that I would like to get this other one while you are reading that. May I see 5, please?

The Clerk: Yes.

Mr. Nesbett: Exhibit 6, your Honor, is a letter on Oaks Construction Company letterhead. "Box 1452, Anchorage, Alaska." Dated, "16th April, 1954. Registered Mail, return receipt requested," typed up in the left-hand corner of the page, addressed to: "Stuart Construction Company, P.O. Box 517, Anchorage, Alaska. Attention: Mr. Stuart Tope, President. Gentlemen: Your attention is directed to our letter of March 22, 1953, notifying you that it was the intention of this Company to enforce the provisions of Article XV in the event you did not comply with the bonding requirements outlined in Article XVII of your Subcontract for clearing work on the Products Pipeline system,

(Testimony of Stuart E. Tope.)

C. E. Project Eng. 95-507-54-1 (Contract DA-95-507, eng-573).

“Your apparent abandonment of the job, and removal of your [129] equipment from actual work on April 15, 1954, is also deemed specific grounds for invoking Article XV.

“Now, therefore, it is the opinion of this Company that your not ‘proceeding with diligence and in such a manner as to satisfactorily complete said work within the required time.’

“You are formally given notice, that Oaks Construction Company, having given reasonable notice in writing, now effective this date, exercises its rights under subcontract agreement, Section XV specifically, ‘To take over said work and to complete the same at cost and expense to Subcontractor, without prejudice to Oaks Construction Company’s other rights or remedies for any loss or damage sustained.’” Signed: “Oaks Construction Company.” “Signature, “Carl E. Oaks.”

The Court: Did that say the machinery was taken off the 15th of April?

Q. Your Honor, it said, “Your apparent abandonment of the job, and removal of your equipment from actual work on April 15, 1954.”

The Court: Yes.

Q. Now, Mr. Tope, did you have any equipment—rather, I’ll ask you first, when did you receive this letter of April 16, 1954?

A. If it came from Anchorage, I don’t think

(Testimony of Stuart E. Tope.)

I could have gotten it less than two or three [130] days.

Q. You did receive it nevertheless, didn't you?

A. Yes.

Q. At the time you received it, did you have any equipment working on that clearing job?

A. Yes; I did.

Q. What equipment did you have on the job?

A. There was one tractor and the 21½-ton truck and a pickup.

Q. Were you on the job yourself at the time you received this letter? A. Yes.

Q. Did your equipment remain on the job for any period of time after you received this notice?

A. Any time around May 1.

Q. Did your Caterpillar remain on the job until May 1? A. Yes.

Q. Was it operating?

A. As far as I know, it was, yes.

Q. And did your Dodge truck remain; your fuel truck remain on the job until May 1?

A. Yes; it did.

Q. How about your—the Ford Station Wagon?

A. Yes.

Q. And did you, yourself, stay on the job after you received this letter?

A. Yes; I did. [131]

Q. How long after the date of—after the receipt of this letter did you, yourself, remain on the job?

A. I remained right there up to the very end.

(Testimony of Stuart E. Tope.)

Q. Did you receive your foreman's pay in the latter part of April of 1954?

A. No; I didn't.

Q. Did your pay as foreman stop somewhere around the date of this letter, to the best of your knowledge?

A. I believe before.

Q. Now, what duties were you performing at the time this letter reached you?

A. Well, I was expediting parts mostly.

Q. Was Mr. Abbott still running the job for Oaks?

A. Yes; he was.

Q. Was Mr. Allred running his cats at the other end, working toward you, for Oaks and running the McLaughlin cats?

A. Yes; he was.

Q. And was the Rogers-Babler Caterpillar working in the area where you were also working?

A. Yes; it was.

Q. Was May 1 the last date that you have charged any rental on any of your equipment against Oaks Construction Company?

A. I believe it is. [132]

Q. What did you do with your last remaining Caterpillar and the Dodge truck after they were removed from the job on May 1?

A. I took the 2½-ton truck back to Fairbanks and turned it into the N. C. Company.

Q. And what did you do with the Caterpillar?

A. The——

Q. Was that Caterpillar in total running order?

A. No; it wasn't.

Q. What was wrong with it?

(Testimony of Stuart E. Tope.)

A. The starting motor was out of time.

Q. What did you do with the Caterpillar?

A. I finally got another cat over there and got it started and run it from Dot Lake to—I operated it myself and run it from Dot Lake to Tok Junction.

Q. And what distance was that?

A. Around fifty miles.

Q. And what did you do with the Caterpillar then?

A. Tore the starting engine off and repaired the starting engine.

Q. Now, about when did you perform that work?

A. Some time in May or June, somewhere in there.

Q. Now, was the entire clearing work completed as of May 1, the date you took your equipment away from the job? [133]

A. I think that it was about another week after that.

Q. Why did you leave the job before the work was completed?

A. Well, I couldn't get anybody to talk to me or anything so I just shut my equipment down; I had never received any money; wasn't even receiving a paycheck, so I just shut it all down.

Q. Did you have any discussion with Oaks during the month of May about payment for the use of your Caterpillar or the work you performed?

A. No.

Q. Did you have any discussion with Mr. Craw-

(Testimony of Stuart E. Tope.)

ford in that respect? A. I can't recall.

Q. What did you do with all of your caterpillar equipment, all three of them? What happened to them?

A. Well, the one, I took to Fairbanks, the other one was sitting along Robinson River. I lifted the motor out of it and took it down to Forty Mile country and had the crankshaft ground and new bearings put in it and fixed it up so it would run.

Q. And did you run it or deliver it anywhere, take it anywhere?

A. Yes; I took it to—I took it down to Salana.

Q. Now, did you, subsequent to leaving the job, on May 1, [134] attempt to arrange any meeting with representatives of Oaks Construction Company in order to talk about your problem of payment? A. Yes; I did.

Q. And what generally, what attempts were made and what happened?

A. I talked to the Northern Commercial Company and I asked them to set up a meeting with Williams Bros., McLaughlin and Marwell Company—

Mr. Dunn: Excuse me, your Honor. I don't see the relevancy of this. If it's relevant, I would appreciate it being pointed out to me.

The Court: Well, all that is necessary is for him to say that he tried to get a conference. Now, if he got the conference, he can say that and whatever happened in the conference he can disclose.

Mr. Nesbett: All I asked was what he did to

(Testimony of Stuart E. Tope.)

try and arrange a conference and he was explaining.

The Court: He gave some details that I don't think was important and I think that is what counsel objected to. He can tell what he did and not what was said or done by anybody.

Mr. Nesbett: He hasn't quoted anyone yet; I was going to stop him if he started to. Were [135] you——

Q. What did you do to try and arrange a meeting with Oaks Construction Company? Did you say you went to the N. C. Company?

A. Yes.

Q. Was that for the purpose of arranging a meeting with Oaks? A. Yes; it was.

Mr. Dunn: It seems to me it's only directed to a demand for payment and the mere fact he files a suit shows demand for payment.

The Court: Leading up to it, what was said in the conference would bear on the issues, whether there was a refusal to have a conference.

Q. (By Mr. Nesbett): Was a request made of Oaks Construction Company for a conference?

A. Yes; there was.

Q. And did you make any such request yourself to Oaks Construction Company?

A. No; I didn't.

Q. Was such a request made by Northern Commercial Company at your request? A. Yes.

Q. Was any——

Mr. Dunn: I move to strike it, your Honor, [136] it is hearsay.

(Testimony of Stuart E. Tope.)

The Court: Well, I am going to let it stand until it appears, of course, if that is mere hearsay and somebody told him that, it would not be competent.

Q. (By Mr. Nesbett): Do you know that such a request was made by the Northern Commercial Company? A. Yes.

Q. Was a tentative date for any meeting set up?

A. Yes; there was.

Q. And during what month was this meeting set up? A. In August.

Q. Of what year? A. 1954.

Q. And where was the meeting to occur?

A. In Fairbanks.

Q. And did any such meeting materialize?

A. It did not.

Q. Was there a date set for the meeting?

A. Yes; there was.

Q. Were you to be there? A. Yes, sir.

Q. Did you go to the place of the meeting at the time [137] appointed? A. Yes.

Q. Did a representative of Oaks Construction Company appear at that time?

A. He did not.

Q. Did he appear at any subsequent time?

A. Yes; the day before.

Q. And who, if you know, appeared the day before?

A. A gentleman by the name of Hancock.

Q. Do you know Hancock's position with Oaks Construction Company?

A. Office Manager.

(Testimony of Stuart E. Tope.)

Q. Were you ever able to meet with any representative of Oaks Construction Company and a representative of Northern Commercial Company to discuss payment on this work?

A. No; I wasn't.

Q. Were——

Mr. Dunn: I move to strike it. Again I don't see the relevancy of it.

The Court: Well, I think it would be relevant as to the attitude of the parties after the alleged service was rendered. He says he attempted to get a conference and he was unable to do so; he said he knew about it. [138]

Mr. Dunn: I don't understand why the attitude of the parties is relevant. I think we will probably stipulate that they don't like each other by the time——

The Court: There may have been some utterance, or something was said. Now, if he attempted to get a conference about his claimed rentals here on this property and they refused to confer with him, I think that would be competent evidence.

Mr. Dunn: All right.

Q. (By Mr. Nesbett): Did you make any request of Oaks Construction Company that they meet with you and a representative of Williams Bros. to discuss payment for work done on this pipeline?

A. Yes; I did.

Q. Did you receive any reply from Oaks Construction Company concerning that request?

A. I did not.

(Testimony of Stuart E. Tope.)

The Court: When did that occur?

Q. When did you make that request of Oaks Construction Company?

A. I made it through the Northern Commercial Company.

Q. Now, was any notice—I'll strike that question. [139]

Do you, yourself, know that any meetings were had between Oaks Construction Company and Northern Commercial Company with respect to settlement of payment for the work you did do on this pipeline?

A. I heard of it, yes.

Q. Well, do you know that such a meeting and such a settlement occurred?

A. Yes.

Q. When did it occur?

Mr. Dunn: Your Honor, he is probably testifying to hearsay again; he says——

The Court: Well, he says he knows; he first said he heard about it, that would not be competent. Now, counsel asked him if he knew there was such a settlement and he said, "yes," he did.

Mr. Dunn: Well, the proper foundation, your Honor, is how he knows, whether he knows of his own personal knowledge, or somebody told him, and his statement that he knew about it——

The Court: If you want to bring that out on Voire Dire examination, you are at liberty to do that.

Mr. Dunn: All right.

Q. (By Mr. Nesbett): Have you seen any written result of any such settlement? [140]

(Testimony of Stuart E. Tope.)

A. Yes.

Q. Was a written settlement made between Northern Commercial Company and Oaks Construction Company? A. Yes.

Q. And were you present during that settlement? A. I was not.

Q. Did you know that such a settlement was being discussed and made?

A. No; I did not.

Q. Have you consented or assented to the settlement at any time since learning of it and seeing the terms of the settlement? A. No, sir.

Q. Mr. Tope, in Paragraph 8 of the defendant's counterclaim, an allegation is made that to the effect that some \$71,416.29 worth of advances and bills were incurred in connection with this pipeline clearing job, at your insistence and request?

The Court: What's the number of that?

Q. Paragraph 8, your Honor, on page 3 of the counterclaim.

Mr. Dunn: Right at the bottom, sir.

The Court: Yes. [141]

Q. (By Mr. Nesbett): Did you, yourself, have anything to do with obligating Oaks Construction Company in the sum of \$71,416.29?

A. I did not.

Q. Do you understand fully what they mean by alleging that you have caused them to be—or that you have incurred bills and payroll advances in that large sum? A. No, I don't.

(Testimony of Stuart E. Tope.)

Q. In paragraph 10 of the counterclaim on page 4, it's alleged that—and I am reading it from the paragraph—“In addition to said sum of \$38,080.82, plaintiffs have pledged the credit of defendants and have done acts and permitted acts to be done which have resulted in indebtedness, which, unless paid for by defendants, will result in lienable items and claims against payment and performance bonds which will ultimately have to be paid by defendants, all to the sums of not less than \$6,000.00. Such acts of plaintiffs were wholly unauthorized by defendants, or any of them, and wholly unjustified.”

Q. Do you know what they mean by that allegation, Mr. Tope? A. I do not.

Q. Do you admit or deny those statements?

A. I deny it.

Q. Paragraph 9 alleges that, “You owe Oaks Construction [142] Company \$38,080.82.” Do you admit or deny that? A. I deny it.

Q. In Paragraph 12 of the counterclaim on line 3 it alleges that you have maligned and jeopardized the credit rating and business representation of the defendants. Do you admit or deny having have done any such thing? A. I deny it.

Q. Have you ever at any time seen any accounting produced by Oaks Construction Company as to how they themselves came out on their sub-contract in this clearing job? A. I never have.

Q. Have you yourself been sued as a result of this pipeline clearing job? A. Yes, I have.

(Testimony of Stuart E. Tope.)

Q. And by whom were you sued?

A. By Bayless or the Franklin Mining Company and Mr. Harlan.

Q. And what was the nature of the suit filed by Franklin Mining Company, and what amount was involved?

A. For fuel on the pipeline clearing.

Q. And what amount did he sue for?

A. Three thousand dollars.

Q. Where was that suit commenced? [143]

A. In Fairbanks.

Q. Now, is the suit still pending, has it been settled, or tried? A. No, it hasn't.

Q. What were the circumstances surrounding the claim of Franklin Mining Company in the amount of three thousand dollars? How did that claim arise, if you know?

A. Mr. Bayless hadn't been paid for his fuel and he asked me—said that he would—had stopped giving us any fuel until he had gotten some money; I immediately called the—Mr. Crawford in Fairbanks.

Q. Who?

A. Mr. Crawford in Fairbanks, and told Mr. Crawford the circumstances and Mr. Crawford came down and I had a meeting with Mr. Bayless and Mr. Crawford in the Tok Lodge. And Mr. Crawford said, "Oaks is making all the—paying all the bills and that he should have this—plenty of money. He has plenty of money coming." And he said, "You

(Testimony of Stuart E. Tope.)

go ahead and we guarantee you all these bills. You go ahead and give them the fuel."

Q. Who said that to whom?

A. Mr. Crawford said that to Mr. Bayless, and Mr. Bayless said, "I can't do that," he says, "I have to have [144] some money." So Mr. Crawford told him, he said, "A check would have to come from Anchorage for it." And I told Howard Bayless—he said he had to have some money, so I told Howard, I says, "Well, if I give you a check for three thousand, will that be sufficient?" and he said, "yes." And I said, "Well, will you hold it two or three days until they get some money in there for me and so that it will clear?" And he said, "yes," and Mr. Crawford said that there was plenty of money, that I had done enough clearing that there would be plenty enough money that would be there for it.

Q. What happened to that check, did you give it to Mr. Bayless? A. I did.

Q. And was it cashed by Mr. Bayless; what happened to it? A. It was returned NSF.

Q. And has it ever been paid that amount, \$3,000, to Mr. Bayless, to your knowledge?

A. It has not.

Q. Who had been paying Mr. Bayless' fuel bill for fuel used on your equipment up to that time?

A. Mr. Oaks.

Q. Do you know why the three thousand dollar bill was not paid by Mr. Oaks? [145]

A. I haven't any idea.

(Testimony of Stuart E. Tope.)

Q. Did you—did Mr. Oaks pay any or all subsequent bills for fuel incurred for the Franklin Mining Company? A. Yes.

Q. And——

The Court: What was the date of when this check was given?

Q. Do you know the approximate date on that check, Mr. Tope? A. I do not.

Q. Approximately how long after the pipeline job commenced did this occur?

A. I can't recall.

Q. I think we will establish it, your Honor, fairly accurately with another witness, Mr. Bayless himself. Now, what is the other suit you mentioned, commenced by Mr. Harlan, was that filed in Fairbanks District Court, also? A. Yes.

Q. In the total amount of five hundred twenty-seven dollars and nineteen cents, has Mr. Harlan been paid the sum demanded in that suit?

A. No; he hasn't.

Q. Is the suit still pending?

A. Yes. [146]

Mr. Nesbett: I believe that is all, your Honor, with exception of offering it or asking Mr. Dunn at this time if my exhibit 2 has been examined and whether he has any objection to it being accepted into evidence?

Mr. Dunn: It hasn't been examined, your Honor; I have been listening to the witness.

The Court: Very well. You are through with direct examination?

(Testimony of Stuart E. Tope.)

Mr. Nesbett: Yes, your Honor.

The Court: Very well, you may cross-examine.

Cross-Examination

By Mr. Dunn:

Q. Your Honor, I would appreciate a recess if we can have it.

The Court: Would five minutes be plenty of time?

Q. It will give me enough time.

The Court: The Court stands recessed for ten minutes.

(A ten-minute recess was taken at 11:20 a.m.)

The Court: I believe you are ready for cross-examination, are you?

Mr. Dunn: Yes, sir.

The Court: Very well, the witness may [147] resume the stand.

Q. (By Mr. Dunn): Your Honor, it is pretty standard practice in this Court to require counsel to stand. I would like permission to remain seated, if I may, while I cross-examine the witness?

The Court: Very well.

Q. Mr. Tope, when did you say that Stuart Construction Company was incorporated?

A. I believe around in November of '52.

Q. Have you been president of that corporation since the time it was incorporated? A. Yes.

Q. Do you have a stock book to that corpora-

(Testimony of Stuart E. Tope.)

tion? A. I have stock certificates.

Q. Are they available in this courtroom?

A. No; they're not.

Q. Where are they?

A. They are in a safety deposit box.

Q. Where is the safety deposit box?

A. National Bank of Alaska.

Q. In Anchorage? A. Yes.

Q. In whose name are these certificates?

Mr. Nesbett: Your Honor, I'll object, I [148]
don't see the relevancy of all this.

The Court: Well, counsel has challenged the corporate entity and he would have a right to make inquiry about it to establish it. It is still in the background as an entity claiming or may claim some interest in the lawsuit, so counsel have a right to ask questions about it.

Mr. Dunn: In whose name or in what name, as the case may be, are these certificates?

A. They are in Mr. Sanders, attorney here in town, Stuart Tope, Bertha Tope, and Donald Maynick.

Q. Your Honor, I would very much appreciate your directing the witness to produce those this afternoon.

The Court: Well, I do not think that would be evidence as to whether it is a corporation or not. Now, that would be merely to give you information and satisfy your curiosity, but I can't see where it would be of any material help in the case. If it

(Testimony of Stuart E. Tope.)

bears on the question of corporate entity then you would be entitled to see them.

Mr. Dunn: I think it would, your Honor; the fact that—of course, if they are in existence it would help me, but if they are, in fact, non-existent, it would be one of a number of [149] developments which would tend to disprove corporate entity.

The Court: You are not asking merely for evidence just for your inspection. They would be no benefit in the trial of the case as evidence, unless, as you say, the evidence shows it was not a corporate or something of that effect; I can't see where they would be of any benefit, but are you—is it because of your challenge that it's not a corporate entity?

Mr. Dunn: Yes.

The Court: Would you produce those for the inspection of counsel this afternoon?

Mr. Nesbett: I'd like to say a word on that, your Honor; I don't know whether he can produce the certificates or not. It is rather an unusual thing to ask a man to run around and round up certificates that had been issued to shareholders.

The Court: He says they are in the box down there.

Mr. Nesbett: I can, and I have here receipts taken off each certificate showing that they were received by the persons to whom the certificate was issued at the time of issuance.

The Court: Yes.

(Testimony of Stuart E. Tope.)

Mr. Nesbett: And that is one of the [150] things I thought we could handle between one and two, possibly.

The Court: I was proceeding, of course, you would not have to gather up certificates and hand them to somebody else. Of course, he said they were in the box down there.

Mr. Nesbett: I don't know whether he meant his wife——

The Court: I think a single certificate would be sufficient; if they are all there, bring them all over.

Mr. Nesbett: There is a receipt for every certificate issued.

The Court: Well, ordinarily there is a stock book used by corporate entities and, however, the witness says they are in the box and it will be a simple matter for him to bring them over and let counsel see them; where I can't see that would be of much benefit——

Mr. Dunn: Well, do you have your stock book present in court, Mr. Tope?

A. Mr. Sanders made those stock certificates up.

Mr. Dunn: Do you have your stock book present in court?

A. I do not. [151]

Q. (By Mr. Dunn): Do you have receipts for those stock certificates present in court?

The Court: I believe that counsel said that they were here, didn't you, Mr. Nesbett?

Mr. Nesbett: I did, yes.

(Testimony of Stuart E. Tope.)

Mr. Dunn: May I see those, please?

Mr. Nesbett: Now, this is the sort of thing, your Honor, I objected to as delaying the trial, because he has gone all through this a year ago in depositions; he could have asked for it before the trial and he could go over it from one to two today, but no, we have to stop in the middle of a trial for it, is what I object to.

The Court: Could you proceed with your cross-examination and examine those at a later time?

Mr. Dunn: Yes, your Honor.

The Court: There they are so you have got them.

Mr. Dunn: I'll want to examine the witness with respect to them; that's the reason I was asking.

The Court: Very well. [152]

Q. (By Mr. Dunn): Do you know how many shares of stock were issued, Mr. Tope?

A. They're on those certificates there.

Q. Are these the certificates you are talking about? A. They are.

Q. Do those show the four stockholders that you named? A. Yes.

Q. What consideration was given the corporation for these stock certificates? A. Monies.

Q. How much money?

A. The first deposit on that, I believe, was in—it was to the City National Bank and, I believe, around three thousand dollars.

(Testimony of Stuart E. Tope.)

Q. For the stock evidenced by all of these certificates? A. Yes.

Q. I'll return them to you, Mr. Tope, and ask you how many shares are represented by these stubs?

A. Five shares to Stuart Tope, five shares to Donald Maynick, and five shares to Bertha Tope, and one share to William Sanders.

Q. That would be 16 shares, is that correct?

A. That is correct.

Q. Well, now the three thousand dollars that you [153] mentioned, was that in payment for the entire 16 shares?

A. That was in—for the—for 15 shares.

Q. Is it true then that that was for all of them except that of Mr. Sanders?

A. That is right.

Q. And who paid the three thousand dollars?

A. Bertha Tope and Donald Maynick and Stuart Tope.

Q. In equal amounts? A. No.

Q. How much did Stuart Tope pay?

A. Stuart put in it, well, there was five hundred dollars from Donald Maynick and five hundred from Bertha and five hundred from me for my stock and the balance of the money I put up myself to make up the three thousand dollars to give the corporation an account.

Q. Does this stock have a par value?

A. I believe that is in the minutes of the corporation which are there in the courtroom here.

(Testimony of Stuart E. Tope.)

Q. Well, do you know?

A. I offhand, I believe one hundred dollars a share.

Q. And do I understand you correctly to state that the stock for Bertha Tope, Donald Maynick, and Stuart E. Tope was paid for by paying the amount of fifteen [154] hundred dollars?

A. Five hundred dollars each.

Q. Well, that is fifteen hundred dollars, isn't it?

A. Yes.

Q. And it was fifteen hundred dollars, then, that went to pay for this stock?

A. That's right.

Q. Now, I—and each stockholder paid five hundred dollars? A. That is right.

Q. How about Mr. Sanders, here?

A. Mr. Sanders' share was taken for services rendered.

Q. To whom?

A. I don't understand you.

Q. Services rendered to whom?

A. To the Stuart Construction Company.

Q. In the course of incorporating it?

A. That is correct.

Q. Your Honor, I would like to have these marked for identification, if I could? They are receipts numbered one to four; four certificates numbered one to four, representing the total of sixteen shares of Stuart Construction Company. Now, whether or not they will become material as evidence depends entirely upon the stock certificates,

(Testimony of Stuart E. Tope.)

whether [155] or not they're produced. If they are produced then these things won't have any great value.

The Court: Of course, if the stock certificates are outstanding the witness should not be required to come up and find the stockholders in order to bring the certificates in.

Mr. Dunn: That is true.

The Court: But if they are in the vault, as he indicated, why he can bring those over.

Mr. Dunn: That is the reason I asked him for them. May I have these marked for identification, please?

The Court: Yes.

Mr. Dunn: You are familiar with them, are you not?

Mr. Nesbett: Yes, but I would like to ask how——

The Court: I am unable to perceive at this time, but maybe somewhere along the line they may have a bearing, I don't know.

Q. (By Mr. Dunn): Now, what was the other fifteen hundred dollars, then, Mr. Tope; you said three thousand dollars was deposited to the corporate account, did you not?

A. I believe it's around that amount, yes. [156]

Q. And the remaining fifteen hundred was what then?

A. Well, just put money in there to help the corporation, to give it a bigger balance.

Q. And that was your money?

(Testimony of Stuart E. Tope.)

A. It was.

Q. Were these certificates issued on the date shown on the receipt?

A. I believe that's in the minutes of the corporation. I just can't tell you.

Q. I am not asking you what the minutes say; I am asking whether or not the certificates were issued on the dates shown on the receipt?

A. I imagine they were.

Q. Do you know whether or not they were?

A. That's quite some time ago; I can't recall it.

Q. If I showed you the receipts would that be of any aid to you?

A. If it states on the receipt that the stock was issued at that time, it was issued at that time.

Q. Thank you.

Now, at the same time, was the money deposited in the City National Bank?

A. I believe that it was.

Q. In what account?

A. Stuart Construction Company. [157]

Q. That is a corporate account, is it?

A. Yes.

Q. Did you testify on direct examination that you refused to lease your cats, your Caterpillar tractors to Mr. Oaks? A. Yes; I did.

Q. And you did so refuse? A. I did.

Q. Tell me why.

A. I didn't hear you, sir.

Q. Will you tell me why, why you refused to lease them to Mr. Oaks?

(Testimony of Stuart E. Tope.)

A. Usually, when they lease a piece of equipment, they don't take care of it like you would if you were doing it yourself.

Q. Is that the only reason you refused to lease it to him? A. I believe so.

Q. Did you testify on direct examination that you attempted to obtain a bond from someone by the name of Molitor? A. I did.

Q. And did you so attempt? A. I did.

Q. Do you know that man's first name?

A. Frank Molitor. [158]

Q. Are you sure it's Frank; could it be Hank?

A. Frank J., I believe; I am not positive of that, no.

Q. Was he a heavy-set man or slender man?

A. He was a very heavy-set man.

Q. Well, this bonding business of his, did it have a name? A. I couldn't say.

Q. Was that bonding business carried on in an office?

A. That I can't tell you. He had an accounting office at that time.

Q. At what place did you consult Mr. Molitor about this bond?

A. Above the Glass Sash and Door Company on Fourth Avenue.

Q. In an office? A. In an office.

Q. Did that office bear the name of any business?

A. It was an accounting concern, yes.

Q. It bore the name of an accounting business?

(Testimony of Stuart E. Tope.)

A. Yes.

Q. Was there any sign on the door advertising bonding or anything like that?

A. There was not.

Q. How did you happen to go to Mr. Molitor?

A. I was told to go there.

Q. By whom? [159] A. By Mr. Oaks.

Q. Now, when was this, please?

A. It was some time in December or November, somewhere in there.

Q. Of what year? A. Of '53.

Q. Was it before Plaintiff's Exhibit 1, which is the contract between Oaks Construction Company and Stuart Construction Company, was signed? A. It was before.

Q. Well, now, did Mr.—you say Oaks told you to go there; is that Oaks himself, the gentleman sitting on my left? A. Yes.

Q. Well, now, did he tell you to go there, or did he advise you to go there?

A. He advised me to go there.

Q. Well, you said, did you not, that you went to another company? A. Yes.

Q. What company was that?

A. They were in the—I can't recall the name of the outfit, but they have since gone out of business and they were on—in the union halls of the 302 Union, International Union of the Operating Engineers [160] Building, and the Truck Drivers Union, and I think there was one other there, but they were in that building.

(Testimony of Stuart E. Tope.)

Q. Where is that building?

A. It's on Sixth Avenue, across the street from the old high school.

Q. That would be on what street, between what street? A. It would be between F and G.

Q. Did Oaks tell you to go there?

A. He did not.

Q. Did he advise you to go there?

A. He did not.

Q. To which place did you go to first?

A. I believe I went to this company I just mentioned, first.

Q. Well, did you go to any other bonding company? A. They're the only two.

Q. Well, as of that time, Mr. Tope, had you been in the construction business in this Territory about four years?

A. Well, I had been in the construction business since I have been here, acting as in a supervisory capacity to various construction firms here.

Q. Well, prior to this time, now, the time you were trying to get the bond, and your experience in [161] construction work, if I understand you, now, was limited to a supervisory capacity?

A. I had been in the contracting business as a building contractor, yes.

Q. When?

A. Well, in various times. It was in 1945 or '44 to, oh, up to '49, and from 1951 through '52.

Q. Well, what did you do—when did you come to the Territory; you came in '49?

(Testimony of Stuart E. Tope.)

A. That is right.

Q. I am interested only in your activities subsequent to that time, after your arrival in the Territory in '51 and '52, were you in the contracting business? A. Yes.

Q. As a contractor or what?

A. As an independent builder contractor—contracting building, yes.

Q. Did you work under contracts?

A. I did not.

Q. Now, I didn't say sub-contracts, Mr. Tope.

A. I worked under no contract.

Q. Neither a prime contract nor a sub-contract?

A. No, sir.

Q. Now, did that situation exist from the time you came to the Territory until you went to work for Oaks, that [162] you worked under no contract? A. I did not.

Q. Then the situation did exist during that period of time, is that correct?

A. Repeat the question, please?

Q. Then the situation did exist during that period of time, is that correct?

A. That there was no contract?

Q. That you—I'll repeat the question. From the date of your arrival in the Territory of Alaska, 1949, until such time as you made this contract with Mr. Oaks, is it true that you had not engaged in the construction business as either a contractor or a sub-contractor?

A. Yes; I had the Tope's Construction Com-

(Testimony of Stuart E. Tope.)

pany, yes. But I was building my own houses under that name.

Q. Well, now, you are distinguishing between yourself and Tope Construction Company?

A. But as for taking a sub-contract or a contract with any other firm, I did not.

Q. Now, is that you as an individual you are talking about?

A. I'm talking about me as an individual, that is right.

Q. How about this Tope Construction Company that you mentioned, did that take any contracts or sub-contracts?

A. No; they did not.

Q. How about Stuart Construction Company, Inc.? [163]

A. Yes; they did.

Q. Well, what contracts did Stuart Construction, Inc., take?

A. Well, the only one that they did was signed, the contract with Mr. Oaks.

Q. All right, but prior to that time they had taken none, is that correct?

A. That is right.

Q. And you had no occasion to try to get a bond prior to December or November of 1953, is that correct?

A. That is correct.

Q. And is the same true of Stuart Construction Company, Inc.?

The Court: Would you repeat the question, please?

(Testimony of Stuart E. Tope.)

Q. Is the same true of Stuart Construction Company, Inc.?

A. That they did not take a contract?

Q. That they had no occasion to try to get a bond previous to November or December of 1953.

A. None whatsoever.

Q. Then it is true? A. That is true.

Q. And——

The Court: Are you at a point where we might suspend, Mr. Dunn? [164]

Mr. Dunn: Beg your pardon?

The Court: Are you at a point where we might suspend, now?

Mr. Dunn: It makes no difference to me.

The Court: Yes. I will have a small matter that may take ten minutes after 2:00 o'clock so I am going to adjourn until 2:00 o'clock, but you gentlemen need not be here at exactly at 2:00. If you will be here at ten minutes after 2:00, it's all right.

Mr. Nesbett: I would like to see Mr. Oaks' records that Mr. Dunn provided, at 1:00 or 1:15 here in the courtroom, and, of course, the records I brought are available. I don't want to take the Court's time.

The Court: I think that is very commendable. Have you the records here that counsel might inspect them?

Mr. Dunn: Yes; I have a slug of them.

The Court: It would be agreeable then for you to do it—you gentlemen here, it's all right at 2:00 o'clock, I just wanted it for your convenience.

Mr. Dunn: Well, your Honor, I am perfectly willing to turn my records over to Mr. Nesbett. I am not going to accuse him of taking any of them and [165] I know Mr. Oaks isn't. I would prefer myself not to be here at 1:00 o'clock. Now, I will make these—I have already stored some books there.

The Court: Make them available to Mr. Nesbett.

Mr. Dunn: And I'll store some other things here.

Mr. Nesbett: Well, I don't want them, your Honor, I learned from experience that I might lose some and then I would have a hard job of ever explaining it; I'd rather look at them here, and possibly if the Bailiff is here, or if not, Mr. Dunn, or at least someone, so that I could look at them and whoever had custody of them would have the same books when through as they had when they started.

The Court: Mr. Johnson will be here. Let the Court stand in recess until 2:00 o'clock.

(The Court then recessed until 2:00 o'clock p.m.)

Afternoon Session

(The trial was continued.)

The Court: Are the parties ready to proceed in the case on trial?

Mr. Nesbett: Yes, your Honor.

Mr. Dunn: Yes, your Honor. Mr. Nesbett asked

for records which I left in the court and they [166] keep coming up and here is some more.

The Court: More records?

Mr. Dunn: That I would like to deposit.

The Court: Is the plaintiff here? The plaintiff is on cross-examination, I believe.

Mr. Nesbett: Your Honor, Mr. Dunn—I have checked with him and he doesn't want to stipulate that my exhibit, the cost of operations—I haven't got the number right now; I think it is number 2 G, into evidence without examining the accountant who prepared it; and I have the accountant here now with his work sheets and Mr. Dunn has agreed that I can put him on out of order.

The Court: Very well, you may do that.

Mr. Nesbett: I'll call Mr. Wayne Hubbard.

Mr. Dunn: I'd like to make a comment, your Honor, in the hope of saving some time. I don't know whether I will or not; I believe that is Exhibit 2 F that is in question here.

The Court: I think you are right about that and, as I understand it, the sole purpose of going in—of calling Mr. Hubbard is to establish accuracy, or, rather, the—yes, it would be accuracy or the amount of this deduction, the amount by which they are willing to reduce their claim. [167]

Mr. Dunn: Now, we have, of course, no objection to their reducing the claim in that amount. I don't see what's going to be served by talking to Mr. Hubbard.

The Court: I don't either. Irrespective of whether this proves to be accurate or inaccurate,

it is a matter of computation. The witness testified what the—as I recall, what the expenses were. Now, then, he testified what he considered the rentals, so it's purely a matter of deduction.

Mr. Dunn: It can't very well go to our claim. We are, of course, going to set up our own costs on this thing and my feeling is that it would sort of be a waste of time.

The Court: Well, that would be my notion about it, because I understand counsel made the computation; the witness testified and upon his testimony you made the computation, did you not, Mr. Nesbett?

Mr. Nesbett: Yes, but I want Exhibit 2 in evidence for your Honor's consideration when this case is closed, and if he won't stipulate that it can go into evidence, I would like to put the man who prepared it on so I can offer it and get a [168] ruling.

The Court: Is he qualified?

Mr. Dunn: Well, then we need Mr. Hubbard if it is going into evidence, and it's to be considered as evidence, then I want to attack the credibility of it.

The Court: Well, let Mr. Hubbard be sworn then.

WAYNE HUBBARD

called as a witness for and on behalf of the plaintiff, and, being first duly sworn, testifies as follows on:

Direct Examination

By Mr. Nesbett:

Mr. Dunn: Mr. Nesbett, these records I left for your inspection, do you want them to remain here?

Mr. Nesbett: I didn't finish going through them all; now I understand you have some more. Yes, I would like to see them.

Mr. Dunn: Do you want them left in Court here? You won't have a chance to look at them any more today, will you?

Mr. Nesbett: No.

Mr. Dunn: You have no objection if I take them with me?

Mr. Nesbett: No. [169]

Q. (By Mr. Nesbett): Is your name Wayne Hubbard? A. Yes, sir.

Q. Are you a certified public accountant?

A. Yes, sir.

Q. And——

The Court: First name is?

Q. Wayne, W-a-y-n-e, is that correct?

A. That is correct.

Q. Could you have an office here in Anchorage?

A. Yes.

Q. Were you contacted by me on behalf of Stuart Tope to prepare a certain cost accounting analysis of a construction job? A. Yes.

(Testimony of Wayne Hubbard.)

Q. Did you prepare such an analysis?

A. Yes, sir.

Q. Will you look at the paper that I handed you, which is a copy of Exhibit 2? I'll hand you Exhibit 2 and ask you if you prepared that cost of operations?

A. Yes; I did.

Q. Analysis?

A. Yes; I did.

Q. Did you have the assistance of any person in preparing that? [170]

A. Yes; I had the assistance of Mr. Stuart.

Q. Mr. Stuart Tope?

A. Yes; Stuart Tope.

Q. And did you have any records furnished you by Mr. Tope?

A. Yes; I had certain records furnished by him and then I had other data furnished to me which were estimates.

Q. Do you have the data that you used to prepare that cost of operations and analysis in your file and on your work sheets there before you now?

A. Yes.

Q. Now, what records, specific records, were used to determine the number of hours of operation of a given cat and the cost of operation per hour, per day?

A. Well, mainly, I went through the payrolls which Mr. Tope indicated were for these particular cats which operated, and at the same time, in a breakdown which had been previously made as to the weekly time for each cat, which was evidently

(Testimony of Wayne Hubbard.)

their only record of the number of hours that that particular cat worked during the week.

Q. Are those payrolls in your file folder now?

A. Yes; they are. [171]

Q. Are those payrolls furnished to Tope by Oaks Construction Company payroll statements?

A. Let me look. (Looking for it.) Yes, these are a statement from Oaks Construction Company to Stuart Construction Company.

Q. Was one of those statements used in each instance with respect to each cat to determine the weekly operation schedule or amount of operation?

A. Yes; as near as it could be determined which cat that this particular person worked on at that time.

Q. Yes; now, how did you prepare the cost of fuel oil consumption on the Caterpillars for the weeks shown on your schedule?

A. Those were given to me by Mr. Stuart. It was based on an average consumption of forty gallons per day and a six-day week, with the exception of three weeks when an extra trip, whether or not used, twenty gallons a day, and the price which has been charged to the Stuart Construction by the Oaks Construction was used as an average for the price of fuel oil per gallon.

Q. Did you obtain the payroll tax and the payroll insurance tax and the union welfare fund costs shown in this analysis from the Oaks Construction Company payroll invoices? A. Yes. [172]

Q. As you remember—is this schedule which is

(Testimony of Wayne Hubbard.)

Exhibit 2 for Identification, does it cover each Caterpillar individually with a recapitulation of the total cost of operations as to each Caterpillar on page 1? A. Yes, sir.

Q. What is that total that you arrived at, based on the figures contained in the three following pages?

A. The grand total for the three cats was \$16,-698.

The Court: That's the rental?

A. That was the cost.

The Court: Now, that would cover the——

Mr. Nesbett: Pardon me, I'll ask him this question, your Honor: That would cover the cost of paying the cat operator's wages, his payroll taxes, his insurance and union welfare fund contribution, as well as the lubrication, the maintenance and Prestone needed to keep that cat operating, is that correct?

A. Yes; plus an estimation portion of parts and supplies purchased from the Northern Commercial Company, Fairbanks, of \$3,232.98.

Q. And did you go through the charges made by Northern Commercial Company in Fairbanks, made against Tope for parts furnished on that cat, in order to reach that figure? [173]

A. Yes, but it was difficult to determine that was the exact figure used on those cats at that particular time.

Q. How did you arrive at that figure?

A. Again, Mr. Stuart, I believe, gave that to me.

(Testimony of Wayne Hubbard.)

The Court: Mr. Tope?

A. Mr. Tope, I'm sorry.

Q. Then the \$16,698.00 would include the figure of \$3,232.98, which would be—which would represent the spare parts bought by Mr. Tope for the cats during this period, is that correct?

A. Yes, sir.

Q. And Mr. Tope supplied that figure to you with respect to spare parts, did he?

A. Yes, sir.

Q. Did he have invoices he was going through there? A. Yes; he did have some.

Q. Your Honor——

The Court: What is the figure, the deduction cost, I didn't——

Q. The total deduction from the twenty-five dollars per hour rental, your Honor, would be \$16,698.00. That would be what——

The Court: What was the total rentals that you claim? [174]

Q. The total rentals for all the equipment was \$53,620, your Honor; the total rentals claimed. This would be a deduction.

The Court: And your claim is for the balance, deducting the \$16,698.00?

Mr. Nesbett: We claim as to the balance subject to, as I mentioned in my opening statement, the fact that N. C. Company had, on their own, made, attempted to make an entire settlement of this thing with Oaks, themselves, which will come into evidence by the next witness.

(Testimony of Wayne Hubbard.)

The Court: Later on——

Mr. Nesbett: That is another ten thousand dollars that will have to be considered in some fashion by your Honor.

The Court: Very well.

Mr. Nesbett: I offer that in evidence now, your Honor, Exhibit 2.

The Court: Do you want to examine the witness first?

Mr. Dunn: I'd like to, please.

The Court: Very well.

Cross-Examination

By Mr. Dunn:

Q. Now, Mr. Hubbard, there is—is there any difference between the schedules 1 A, 1, 2, and 1-3, as to the [175] classification of the things itemized? In other words, they all contain payroll and on through to lubricating maintenance, don't they?

A. Yes, sir.

Q. The three schedules are identical in that respect?

A. Yes, sir.

Q. Now, with respect, then, to the three schedules, the payroll column, from what source were those figures of payment?

A. The payroll itself.

Q. The figures reflected in the payroll column on schedules 1—on schedules A-1 to A 3, inclusive, were obtained from what source, please?

A. From the source of the Oaks Construction

(Testimony of Wayne Hubbard.)

charge to the Stuart Construction Company, and which were told to me to be of the particular cats for those particular number of hours within that particular week.

Q. Did you see records that were, or purported to be, Oaks' records from which you obtained those figures?

A. Oaks' records themselves, that is to the——

Q. Or copies of them?

A. Well, it's an invoice of Oaks——

Q. And you obtained it from Oaks' invoice, is that correct? [176] A. Yes, sir.

Q. Do you have those invoices?

A. Yes, sir.

Q. May I see them, please? (The invoices were passed to him.) Perhaps I can be of a little more aid, Mr. Hubbard, I'll try to be. You begin with the week ending the 9th, January, 1954, did you not? A. I believe so, yes, sir.

Q. Well, do you have that invoice, please?

A. Week ending the 9th?

Q. Yes.

The Court: The 9th of what?

Q. January 9, 1954, your Honor.

The Court: You have copies of those invoices?

Q. I have copies of invoices and that is what I am wondering whether they're the same or not.

The Court: I understood they were invoices submitted by the defendant, by the defendant to the plaintiff?

Q. The plaintiffs submitted these invoices to the

(Testimony of Wayne Hubbard.)

witness and the plaintiff says that these are invoices of Oaks, as I understand it?

The Court: That's what I say, the Oaks—the defendant presented invoices to the plaintiff [177] and the plaintiff then submitted them to the witness.

Q. That is what I am trying to find out, whether or not those are the invoices, your Honor?

A. Yes; I have it here.

Q. May I see that one, please? (The invoice was passed to him.)

The Court: Mr. Nesbett, does your Exhibit No. 2 contain a statement of each invoice that—the amount of each invoice or just the totals?

Mr. Nesbett: It doesn't identify the invoice by any number.

The Court: But does it show the figures, the amount of each invoice that is on the cost side?

Mr. Nesbett: It would if you use schedules A-1, 2, and 3, and consider them all, I guess; they had all been on one invoice for one week.

Mr. Dunn: I return this to you now, Mr. Hubbard, and ask you to keep it in front of you. I invite your attention to your Schedule 1 A and ask you whether or not that is concerned with a cat designated "S 23"?

A. Yes, sir.

Q. Now, comparing your Schedule 1 A with the invoice of Oaks, who operated Cat S 23? [178]

A. I couldn't tell you.

Q. Can't you, Mr. Hubbard? I could tell you.

(Testimony of Wayne Hubbard.)

A. Could you? Well, it could have been Wilcox.

Q. How much money did Mr. Wilcox make?

A. \$249.93.

Q. And that is the amount you show on the payroll column for Schedule A 1, is that correct?

A. Yes, sir.

Q. Now, I invite your attention to Schedule A 3, for the week ending January 9.

A. Yes, sir.

Q. And where did you get that figure?

A. That would be based on cat operator's wages for fifty-six hours.

Q. On Cat S 24? A. Yes, sir.

Q. So it could have been a combination of Allison and Morgan, in order to arrive at the \$249.00?

A. Yes, sir.

Q. Let me have your invoice for the period ending January 9, if you will, please? Your Honor, so we can keep this record straight, I'd like to have this marked for identification.

The Court: Does it correspond with your [179] invoice?

Q. Yes, sir. I would like to have that marked for identification, please.

The Court: Is it your exhibit?

Q. It will have to be, I offered it.

The Clerk: Defendant's Exhibit B.

Mr. Dunn: What is A?

The Clerk: Well, it is this.

Mr. Dunn: Oh, that is right, I forgot that.

Q. (By Mr. Dunn): I'll return what is now

(Testimony of Wayne Hubbard.)

Defendant's Exhibit B for Identification to you. Now, we have established, have we not, that Wilcox was operating S 23?

A. Well, I don't know——

Q. For the week ending January 9?

A. I don't know how you could establish that.

The Court: Does it make any difference who was operating; the question is, how much was paid, what the invoice showed?

Q. All right, that's quite true, sir.

Well, have we established then that the operator of S 23, according to your Schedule A, was paid \$249.93 for the week ending January 9, 1954?

A. Yes, sir, for that portion that he was working for those fifty-six hours.

Q. And you get that information from Oaks, invoice, [180] which is now Defendant's Exhibit B, do you not?

A. No; based on the number of cat hours by the operator's time, rate per hour.

Q. Well, maybe I'm wasting time here, but I understood you to say, Mr. Hubbard, that you got those figures from these invoices of Oaks?

A. That is true. Your hourly rate and the hourly rate of the cat operator.

Q. As shown by Oaks' invoice?

A. Yes, sir.

Q. Well, is not the Oaks' invoice for the week ending January 9, 1954, the one you now have which has been marked Defendant's Exhibit B?

A. Well, that wouldn't exactly be, the invoice

(Testimony of Wayne Hubbard.)

would not exactly be or tie in with the operation of three cats.

Q. Well, then, you didn't get the information from the Oaks' invoices, is that right?

A. As to which cat that they operated on and the number of hours that they operated on each cat, no, sir; it doesn't indicate that.

The Court: I thought it was made clear, he took the time of the operators and then he computed the time that the cat was used, the way in which he derived at the operation of the cats, [181] as I understand it.

Q. But I understood all of that came from Oaks' invoice?

The Court: No, sir; the testimony was, as I remember, it was that he took the time—took Mr. Oaks' invoices as to the time of the cat operator and then he computed the time that the cat was in use.

Mr. Nesbett: With one qualification, your Honor, Mr. Tope testified that he told Mr. Hubbard from the payroll that Wilcox, for example, was running S 23 so that he would know which payroll, for example, person to be allocated to each cat.

The Court: Yes; that's the way I understood it.

Mr. Dunn: Well, where did you get the hourly rate from which the payroll column of your Schedule A's were computed?

A. They were computed from the hourly rate and submitted on time slips of the Oaks Construction Company.

(Testimony of Wayne Hubbard.)

Q. All right, where is the time slip for the week ending January 9, 1954?

A. Right here, I guess.

Q. What? A. Where is it? [182]

Q. Yes. A. Here, sir, right here.

Q. Well, now, what is that?

A. The invoice and the name of the men, the day, the number of hours, the hourly rate, and overtime and the gross pay.

Q. Well, now, are you reading from Defendant's Exhibit B?

A. Yes, sir; this is the one that you just handed me back.

Q. Then you got the hourly rate from Defendant's B, which is an invoice of Oaks, is that correct? A. Yes, sir.

Q. Well, what is the hourly rate for the cat in your Schedule A 1 on Plaintiff's Exhibit 2, which is there designated S 23; what's the hourly rate for that cat? A. On which one now?

Q. S 23, your Schedule A 1?

A. The hourly rate for straight time is 5.318; the overtime—I'm sorry, it's the other way—the regular rate is 3.55 and the regular time is 5.318.

Q. All right. Now, how many hours did Cat 23 work according to Defendant's Exhibit B?

A. 56 hours. [183]

Q. And according to Defendant's Exhibit B, did that not indicate Mr. Wilcox ran that Cat S 23?

A. Well, I'm not in a position to say.

(Testimony of Wayne Hubbard.)

Q. Well, he is the only one that made \$249.93, isn't he?

A. But the other two cats are likewise with 56 hours each. And there—which would be the same payroll, would be at the same rate of labor cost, would be the same for the other two cats.

Q. Well, then, how do you account for the fact that the other men didn't make as much money as Wilcox according to Defendant's Exhibit B?

A. Well, they did, Allison made more.

Q. And he ran a cat, didn't he?

A. Yes.

Q. And how about Morgan, what did he do?

A. He ran a cat.

Q. And how did he come out money-wise?

A. Well, which one, Morgan?

Q. Yes. A. Well, he came out \$198.53.

Q. He came out the poorest of the three. That's true, isn't it? He made the least? A. Yes.

Q. Then, why do you show on your schedules A 1, 2, and [184] 3 of Plaintiff's Exhibit 3, the same amount for each of the three cats for the week ending January 9, 1954; namely, \$249.93?

A. Oh, well, as I stated previously, I believe that those were the number of hours given to me that the cat operated.

Q. By whom? Who gave you those hours?

A. Mr. Tope.

Q. Then you got—now, let me see if I understand you. Is this true, that you got the rate, the

(Testimony of Wayne Hubbard.)

hourly rate from Oaks' invoices, but you got the hours worked from what Tope said?

A. Yes, sir.

Q. Now, is that right? A. Yes, sir.

Q. Well, now, all of these costs then—is this true, that all of the costs reflected on these schedules for fuel oil, oil, prestone, and lubricating maintenance are based upon the payroll column?

A. Based on the payroll column?

Q. Yes. A. No.

Q. They're not?

A. No; they're based on the number of hours that each cat worked each week. [185]

Q. Well, isn't the payroll column based on a number of hours the cat worked each week?

A. Yes, sir.

Q. So it's the same thing, isn't it?

A. No, no.

Q. Well, is there a difference? A. Yes.

Q. Between the hours, working hours of the cat?

A. No.

Q. Used in computing the payroll column and used in computing the other column?

A. Not a bit.

Q. Your—everything is based on the number of hours used so it won't be the fuel oil as against the payroll or the oil against the fuel oil; but it is all based on the number of hours.

A. It's based upon the number of hours.

Q. And Mr. Tope is the one who gave you the number of hours?

(Testimony of Wayne Hubbard.)

A. Yes; that is where I obtained those figures.

Q. Well, is it not true then, Mr. Hubbard, that this is not an accounting sheet at all?

It is merely Mr. Tope's claim as to how many hours these cats worked; isn't that what it [186] amounts to?

A. Well, the number of hours and the costs of operating these particular cats, yes.

Q. Based on the number of hours that Mr. Tope said they were? A. Yes.

Q. That's it, isn't it? A. Yes.

Q. Now, then, Mr. Hubbard, just assume that the hours given in the payroll column on your Schedule A 1 to A 3, inclusive, of Plaintiff's Exhibit 2 are accurate, with respect to the number of hours that the cat skinner operated or worked; assume they are accurate with respect to the number of hours worked by the operator, that wouldn't tell you anything, would it; as to how many hours the cat ran, isn't that true?

A. (No response.)

Q. Well, you don't need to answer it; the answer is obvious. I have no further questions, your Honor.

The Court: Is that all?

(Testimony of Wayne Hubbard.)

Redirect Examination

By Mr. Nesbett:

Q. Mr. Hubbard, didn't Mr. Tope tell you that Wilcox or Morgan, or whosever name was shown on any weekly payroll was the operator of such and such [187] a cat, designating it either S 23, 22, or 24? A. I don't recollect that.

Q. Do you know how you assigned the time per week for each cat? How did you arrive at it; from those records and with Tope's assistance, of course?

A. Yes; the number——

Mr. Dunn: Your Honor, I got to object to that because that is just—he certainly has answered that. That was the whole point of my cross-examination, how he arrived at the number of hours.

The Court: There was variance in the testimony so I think counsel has a right to clear it up. I assumed at first that he took the number of hours worked by an operator and then on that computed the hours in which the cat was used.

Mr. Nesbett: That is what I understood he did, but I am asking, I don't know whether he wound up saying——

A. Well, you can't actually from your payrolls, you can't tell how many hours your cat worked.

Q. (By Mr. Nesbett): Well, now, I want to ask you, did Mr. Tope tell you that for a given week Wilcox, for example, was driving such and such a cat and that, therefore, if [188] he was paid

(Testimony of Wayne Hubbard.)

for so many hours, the cat ran so many hours that week?

A. I don't recollect that, Mr. Nesbett.

Q. How did you receive the number of hours per week that you assigned to a given cat?

A. Well, I received—I got them from someplace, but I thought it was some——

Q. Where did you jot them down, on your work sheet? A. Yes.

Q. Under what heading?

A. Oh, here, "Time submitted per Buell A. Nesbett to Dunn." That is where I took the time.

Q. You took the time then from—may I have Exhibit 3? I show you Exhibit 3, does that refresh your recollection to any extent so that you can tell the Court how you arrived at the number of hours a given cat operated in a given week?

A. Yes; I took it from this exhibit, here.

Q. From the pages appended to Exhibit 3?

A. Yes.

Q. And who furnished you that?

A. You did.

Q. And did Mr. Tope bring it over to you when you started work on this job?

A. I believe so. [189]

Q. Very well. Look at—Mr. Hubbard, will you please look at Exhibit 2? A. Yes.

Q. And what is the total number of hours that you have for Cat S 23, for the week ending January 9? A. 56.

Q. And for the week ending January 16?

(Testimony of Wayne Hubbard.)

A. 56.

Q. For Cat S22 for the week ending January 9?

A. 56.

Q. Did Mr. Tope tell you that, when he gave you the hours per week per cat that he had used the payroll names to assign the number of hours to each cat for each week? Do you know how he got that—how the figures were arrived at that you got as representing the hours per week, per cat?

A. Well, from the actual payroll itself, you couldn't, it wasn't indicated on there which cat.

Q. You mean it was simply names?

A. It's simply names, yes.

Q. That's all.

Mr. Dunn: I object to the admissibility of this—if I understand, and I admit I may not, but if I understand the testimony here, this instrument is not a—the fruit of accounting. It's [190] a compilation of information that Mr. Tope gave this accountant.

The Court: Yes.

Mr. Dunn: It's nothing but a self-serving thing; his testimony is already in the record; I don't believe it's admissible.

The Court: Well, it is admissible as to his claim, Mr. Tope's claim, the Plaintiff's claim, that is his computation so whatever it's worth, he'd have a right to present it here.

Mr. Dunn: Do I understand your Honor's ruling, now, to be that my objection goes only to the weight and not the admissibility of the exhibit?

(Testimony of Wayne Hubbard.)

The Court: That's right.

Mr. Dunn: Thank you.

The Court: So No. 2 will be admitted in evidence for whatever it is worth. Now, are you ready to resume your cross-examination?

Mr. Dunn: Yes, sir.

STUART E. TOPE

resumes the stand.

Cross-Examination

By Mr. Dunn:

Q. Mr. Tope, did you find the stock certificates?

A. Beg your pardon?

Q. Did you find the stock certificates?

A. Yes. [191]

Q. May I see them, please? (Mr. Tope passed them to him.) How many are there here that you are handing me? A. Two.

Q. Are these the only ones that were in your safety deposit box?

A. They are the only ones in the safety deposit box.

Q. They were the only ones you found then?

A. Beg your pardon?

Q. They were the only ones you found there?

A. They are the only ones there.

Q. Well, they're not there now, is that the only ones that were there when you went there during the noon hour? A. I didn't go there.

Q. Who did? A. My wife went there.

(Testimony of Stuart E. Tope.)

Q. And you don't know, is that right?

A. Beg your pardon?

Q. And you don't know if there are any others there or not, is that true?

A. No; I just don't know.

Q. May I see Plaintiff's Exhibit 4, please?

The Court: Are those the rental purchase contracts?

Q. Yes, sir. Mr. Tope, what kind of a [192] financial position were you in when you were negotiating this contract on behalf of Stuart Construction Company, if you wish to distinguish between them, and Oaks Construction Company?

A. You will have to repeat that; I didn't hear the first of your question.

Q. At the time of the negotiation of Plaintiff's Exhibit 1, this contract——

A. Yes.

Q. ——what kind of financial shape were you in?

A. Very poorly.

Q. How about Stuart Construction Company, what kind of financial shape was it in?

A. About the same.

Q. How do you account for the fact that you got such extensive credit with the N. C. Company?

A. The equipment worked ever since I had it up until the time that that contract was signed; I assigned all monies that that equipment made to the N. C. Company. There was a job done with the Monard Construction Company which I assigned to the N. C. Company the full amount, and the other was with the Oaks Construction Company,

(Testimony of Stuart E. Tope.)

on his Salana job, which I assigned all of it to the N. C. Company, and the money was paid to [193] the N. C. Company already.

Q. Was that true from the time you signed the first of those rental purchase agreements?

A. That is true.

Q. Well, now, what work was it that was assigned to the N. C. Company, or under the proceeds of what work? There was the Salana.

A. Salana?

Q. Yes; there was the Salana job with Oaks?

A. Yes.

Q. And when was that?

A. That was in the summer of 1953.

Q. About how long, between what period of time did that job last?

A. I just couldn't tell you the exact time.

Q. I realize that.

A. I believe it started in August and September—started in August, then one of the cats went to Tonsina for MK for a very short period of two weeks, I believe. And the other cat was brought into Anchorage and Mr. Oaks used it over here on a job on Tudor Road.

Q. Well, now, you are being more than generous, Mr. Tope, with your information, but just how long did this Salana job last? It began in August of 1953, and [194] terminated approximately when?

A. I don't know when the job began, because the cat—the job had already been started before my equipment was moved in there.

(Testimony of Stuart E. Tope.)

Q. I mean your work on the job began approximately in August of 1953? Did you not so testify?

A. Yes.

Q. And your work on the job continued how long?

A. I don't know; I just leased the cats to him; I had no part of the contract.

Q. Well, how long did you lease to him, whoever it was, from when to when?

A. I can't remember the date; I just don't know.

Q. You don't have any idea how long it was?

A. I just do not know, no, sir.

Q. And you don't have any idea how much money was paid N. C. Company, do you?

A. I could go back through records and find it.

Q. Do you have the records here?

A. They should be.

Q. I don't doubt that.

A. I think it's on that financial statement that is made there, I believe.

Q. Which one is that?

A. The financial statement was made in 1954, I believe. [195]

Q. Which one are you talking about, the one Morlan prepared? A. Yes.

Q. If that will help you, that is a copy of it, isn't it? I believe you have the original of it, do you not, if you prefer to refer to that?

A. Yes.

Q. Would you prefer to refer to the original?

(Testimony of Stuart E. Tope.)

A. I believe Mr. Nesbett has it there.

Q. I imagine he does. It doesn't show on this statement. Are you questioning this now, the authenticity of that statement that I showed you?

A. You will have to speak a little plainer English to me.

Q. Do you believe that is a true statement? Are you questioning whether or not that is a true copy of the original?

A. No; I am not questioning it, no.

Q. Do you believe it is a true copy?

A. I am pretty sure it is, yes.

Q. Thank you.

And then you had a job with MK, did you?

A. No; I leased the cat for a couple of weeks; they wanted it for just a very short time.

Q. About a 2-week job with MK?

A. Yes. [196]

Q. Well, now, with this Salana matter and the MK matter, the 2-week matter, was that the only income from these cats?

A. No; there was one other short-time job with McLaughlin in Tok, on the Tok Cut-off.

Q. About how short was that job?

A. I believe I received \$900.00 on that, I'm not positive of that.

Q. Is that the only work that that equipment had then, from the time you got it until you went to work for Oaks?

A. In Big Delta, I was working for the Munter Construction Company and I was on their payroll

(Testimony of Stuart E. Tope.)

as an operator, operating one of these cats, and the rental was assigned to the N. C. Company, but it was not deducted. My wages was not deducted from the rental. And at night, I would walk this cat across a river up there and do a little clearing at night so that I could meet my expenses. In other words, I was working about 18 hours a day.

Q. Well, how long did you work—was this Munter, did you say? A. Yes; Munter.

Q. How long did you work for Munter?

A. I think it was around about a two months' job, two and [197] one-half, something like that. The total amount of the cat rental to the N. C. Company was around thirty-three hundred dollars, and if I remember correctly, that amount of assigned monies from the Salana job by Mr. Oaks was paid to the N. C. Company, fifty-six hundred dollars, I believe, something in there.

Q. Well, then, all together, the—from the time you signed these rental purchase agreements until you went to work for Oaks, you received, or rather the N. C. Company received approximately \$8,900.00, is that right?

A. Somewhere in there.

Q. Now, then, during that same period of time, you worked two months for Munter, is that correct?

A. That's what I say, I just can't—I think it was a month, six weeks, two months, somewhere in there; it was over a month's time.

(Testimony of Stuart E. Tope.)

Q. Did you, as an individual, work any place else during this same period of time?

A. When I was working for Munter?

Q. No; from the time that you signed these rental purchase agreements, the earliest of them with the N. C. Company, and the time you went to work for Oaks, did you work for anyone besides Munter? [198]

A. No; I just worked for—I just leased the equipment to Mr. Oaks. I was not——

Q. And that was all assigned to the N. C. Company, wasn't it? A. Yes, sir.

Q. Now, when was this hourly rate that you allege Oaks said he'd pay you, agreed upon, Mr. Tope? A. I beg your pardon?

Q. When did you and Oaks agree upon the hourly rate of rental that you claim you and he did agree to?

A. We did not agree to any rental or hourly rental. He just said to go up there and work on an hourly basis and if anyone asked him—anybody on the pipeline asked me who I was working for, I was working for him.

Q. Did anybody ask you? A. No.

Q. Well, you do testify, do you not, that Oaks agreed that you would be paid for your equipment on an hourly basis?

A. Yes, but we didn't agree to any hourly rate.

Q. You agreed on an hourly basis, but not an hourly rate?

(Testimony of Stuart E. Tope.)

A. Hourly basis would be the same thing, would it not?

Q. Well, I don't know; I'm trying to get information [199] from you. Do you now testify that Oaks agreed to pay you for your equipment at so much an hour?

A. Well, I took it for granted that when he said to go up there and work on an hourly basis that he would pay me on an hourly basis, yes.

Q. All right, then Oaks said, "I'll pay you on an hourly basis," and you said, in effect, "I accept." Is that correct?

A. Well, I don't know whether that was said or not, I just don't recall what was said then.

Q. Well, did you refuse his offer to be paid on an hourly basis? A. No; I didn't.

Q. Then you did accept? A. Yes.

Q. Now, when was that hourly basis agreed upon? A. Some time in December.

Q. Of 1953? A. That is correct.

Q. How long before Christmas was it?

A. Well, I believe it was talked about between the—some time after the first of the year—or after the first of the month, after the first of December.

Q. Well, that would necessarily follow that it was in December, Mr. Tope? [200]

A. Yes, but some time after the first of December. I should say between the 1st and 15th of December.

Q. Between the 1st and 15th? A. I'd say.

Q. Now, do I understand your testimony cor-

(Testimony of Stuart E. Tope.)

rectly to the effect that while an hourly basis was agreed upon, no hourly rate was agreed upon? In other words, is it your testimony that Oaks said, "I'll pay you by the hour," and you agreed to it, but nobody said how much an hour?

A. Only on the contract; on the contract it was agreed as an eighteen dollar an hour, as long as it went along with the rest of the contract, yes.

Q. Yes what? I mean I don't understand your answer at all, Mr. Tope. My question is this: Is it your testimony that Oaks offered to pay you on an hourly basis and that you accepted it but that no hourly rate was agreed upon?

A. I said on the contract.

Q. I know what you said.

A. There is an eighteen dollar an hour, per hour on the contract and that eighteen dollars went along with the contract because it——

Q. Well, you did know, didn't you, you didn't go [201] along with the contract?

A. Pardon?

Q. You didn't go along with the contract, did you?

A. No; I didn't.

Q. All right. I'm talking about you.

A. We based that—well——

Q. Look, Mr. Tope, it looks to me like we are making a mountain out of a mole hill. The only thing I'm asking you is, did you and Oaks agree upon a figure?

A. We did not.

Q. In dollars and cents to be paid per hour?

A. We did not.

(Testimony of Stuart E. Tope.)

The Court: Are you referring now to his wages, that \$250.00 a week, or——

Q. No, sir; I'm referring to the rental.

The Court: This equipment?

Q. Equipment rental, yes.

So you agreed that you had been paid by the hour for this equipment, but not how much an hour, is that right? A. That is right.

Q. Now, did you make any agreement as to who'd pay for the maintenance on the equipment?

A. No; we didn't. [202]

Q. Did you make any agreement as to who would pay for fuel oil? A. Yes.

Q. What did you agree upon on the fuel oil?

A. Mr. Oaks said he would pay all the bills.

Q. Except maintenance?

A. He didn't—I don't believe he was—maintenance is—wasn't mentioned.

Q. Fuel oil, was fuel oil mentioned?

A. That is, to operate the cat you had to have fuel oil.

Q. I agree with that. Was fuel oil mentioned?

A. Yes, it was.

Q. And what was said about fuel oil?

A. That he'd pay all the bills.

Q. Is that the only mention that was made to fuel oil? A. As far as I know.

Q. Was any mention made of lubricants?

A. I don't believe so.

Q. Was any mention made about hauling the cats up there?

(Testimony of Stuart E. Tope.)

A. He made some kind of a deal with Mr. Tony Gillespie——

Q. No, now, I'm talking about a deal that you say you made with Oaks? [203]

Mr. Nesbett: I object, let the witness answer the question, your Honor.

Mr. Dunn: That is all I want him to do, your Honor.

Mr. Nesbett: He interrupted before——

The Court: His answer was there was some sort of arrangement made with somebody.

Mr. Dunn: With Gillespie, your Honor. It is obviously not responsive because my question is related to the contract that he alleges he made with Oaks.

The Court: Now, is this the contract in modification of the main contract?

Mr. Dunn: I don't know; I am trying to find out just what this man does contend.

The Court: Well, he hadn't finished his answer and it may be that the answer would be that the rest of it would answer your question. Had you finished your answer?

A. He made some kind of a deal with Mr. Gillespie to haul that equipment up there, but what deal he made with him, I do not know, but there was a charge to be made back to me for the hauling of the cats to Tok.

Q. You were to pay then according to the agreement [204] you say you had with Oaks, you were to pay for getting the cats on the job?

(Testimony of Stuart E. Tope.)

A. That is correct.

Q. Now, who was going to furnish the men to run them? A. Mr. Oaks.

Q. And how much was he going to pay them, pay the man?

A. He would have to pay the regular scale.

Q. What did he agree with you on?

A. He didn't agree on anything with me.

Q. He didn't agree with you one way or the other on that? A. No, sir.

Q. Now, let me ask you—let me go over this, I want to be sure I understand it before I start asking you questions on it. Now, what I'm interested in is the contract that you claim you made with Mr. Oaks. And by "you" I mean Stuart E. Tope.

Mr. Nesbett: I will object to long speeches to the witness; after all, he has an opportunity to ask him questions.

The Court: The question ought to be asked and see if the witness can answer it.

Mr. Dunn: Is this the contract that [205] you made with Mr. Oaks, that you would furnish him three cats, a 2½-ton truck, a Ford station wagon, and a pickup at so much an hour, although no hourly rate was agreed upon, nor was any agreement made as to who would maintain the equipment; nor was any agreement made as to fuel oil, except that Oaks said he'd pay all the oil bills, nor was any agreement made with respect to lubricants, except that Oaks said he would pay all the bills;

(Testimony of Stuart E. Tope.)

that you would pay to get the cats on the job and that Oaks would furnish the men?

A. You will have to repeat.

Mr. Nesbett: I object to the question as too long, compound, and almost unintelligible.

The Court: Well, I think I see what is the object of the inquiry; there was an original contract and apparently the parties started on that contract. The terms of the contract were such, this plaintiff take over the clearing of the space there for probably one hundred miles. Now then, apparently neither party proceeded on that contract. The plaintiff had not been able to give bond and then there must have been some sort of an understanding, or else the suit [206] proceeds in a sum set, that is an assumption that since the plaintiff and the defendant used the cats, used the equipment, that he is bound to pay something for it, and you fixed it at around twenty-five dollars, and the testimony showed that. Now, counsel is trying, even deferring to find out whether or not there was an oral contract independent of this written contract. I think that is what you are after.

Mr. Dunn: I would like to restate that; I would like to find out if this witness claims there was an oral contract.

The Court: That's right, exactly, for the use of the cats independently of this original contract, but apparently was never carried out.

Mr. Nesbett: The reason I objected to the ques-

(Testimony of Stuart E. Tope.)

tion, your Honor, it was probably fifteen or sixteen lines long and incorporated in one question.

The Court: Suppose we shorten the question and find out whether or not there was any sort of an understanding between the parties independently of this written contract. He would have a right to modify the written contract in an oral agreement, if they wanted to, as far as I know, unless the law in the Territory forbids that. [207]

Q. (By Mr. Dunn): I'll shorten it, your Honor; I was actually trying to help the witness. What were the terms of the contract made between you and Oaks? A. Orally?

Q. Did you make any contract with him besides an oral contract?

A. We had—Mr. Oaks and I, when we first sit down to that contract——

Q. First, Mr. Tope, answer the other question. Did you make any contract with him besides an oral contract?

A. There was a signed contract.

The Court: Did you say besides the oral contract?

Q. Besides an oral contract, yes.

A. I signed a contract, yes.

Q. You are a party to that contract?

A. Yes.

Q. Is that the one that is in evidence as Plaintiff's Exhibit 1? A. That is correct.

Q. All right, now ignore that one. Did you make any oral contract with Mr. Oaks?

(Testimony of Stuart E. Tope.)

A. At the time that contract was signed? [208]

Q. Now, I believe you can answer that yes or no.

The Court: Well, subsequently to signing the contract, the original contract—now, if I may interpolate here, the original contract was a written contract; it was never carried out. Now, your point is that, after that was there an oral contract between the parties. Is that what you wanted? If they made an oral contract before it was merged into the written contract? They would have a right subsequently to modify it orally if they wanted to. Now, the question is: Did they make an oral contract subsequent to the signing of that original written contract? Is that what you desire to know?

(No response to the Court's question.)

The Court: You bring out the questions in your own way, not in my way.

Mr. Dunn: (Long pause): My question, your Honor, is whether or not there was an oral contract between Tope and Oaks Construction Company. Now, this written contract, I contend, was between Tope and Oaks Construction Company only by virtue of there being no difference between Stuart Construction Company and Mr. Tope, individually. [209]

The Court: Yes, I understand that.

Mr. Dunn: And——

The Court: Suppose you go ahead and ask the witness in your way to bring out whatever information you want.

Court stands in recess for ten minutes.

(Testimony of Stuart E. Tope.)

(A ten minute recess was taken at 3:30 p.m.)

After Recess

Mr. Dunn: I think I had best make an explanatory statement or possibly more accurately answer the question that you asked me, as to what I am trying to establish.

The Court: Well——

Mr. Dunn: In this line of questioning with the witness——

The Court: Maybe I can clarify it. We are not getting anywhere in the case. Now, as I understand, counsel has abandoned this written contract and proceeding upon the theory of quantum meruit.

Mr. Dunn: Oh, here, yes.

The Court: Yes. Now then the only question here is whether there is any understanding between the plaintiff and the defendant as to the right of the—as to the use of plaintiff's equipment [210] by the defendant; that is the only issue in the case.

Mr. Dunn: Well——

The Court: Whether there is any understanding, and if there wasn't, whether he went on and used it—and I understand that counsel is, they're suing upon basis of quantum meruit—whether the plaintiff, whether they're entitled to anything. So that makes the issue a very simple one. And he, I understand the witness is confused as to whether there was any oral understanding, and it would be a simple matter to ask whether there was any under-

(Testimony of Stuart E. Tope.)

standing between him and the defendant for the use of the equipment by the defendant. The defendant apparently took charge of it; that is his testimony; I don't know what the defendant will show, but the defendant took charge of it. Now, when he took charge of the equipment apparently it was supposed that ultimately this bond would be executed, that is, whether the condition precedent would be observed. Now, the question is, and the only question to this witness to answer is: Whether there was an understanding that he was to be compensated for the use of this equipment. He [211] was on the payroll himself at \$250.00 per week; his equipment was used and whether there was an understanding, or no understanding, at least that is—up to this time that is the question in the case.

Mr. Dunn: Well, your Honor, our contention, you see, is this: Of course, we haven't proceeded to prove our case.

The Court: No, sir, I understand that; I'm only speaking from the plaintiff's viewpoint, as to what he is saying about it.

Mr. Dunn: Well, you see, he has said that this written contract is an nullity. Now, we don't agree with that.

The Court: Well, exactly, so you go on and try the case and let's get along with it, because we are using a lot of time here and not getting anywhere.

Mr. Dunn: Well, I just thought I could be of help.

(Testimony of Stuart E. Tope.)

The Court: I thought I could be of help, but apparently I can't, so I'd like to proceed.

Q. (By Mr. Dunn): When did you talk to Mr. Olday about getting a [212] bond?

A. Sometime in December.

Q. When in December?

A. It was before Christmas.

Q. Can you place it any more accurately than that?

A. I cannot.

Q. Between the 1st and what date?

A. I can't tell you that, because I just don't remember.

Q. Was it before or after the written contract was signed?

A. I can't tell you.

The Court: He told us one time before that he thought at one time this contract was signed on December 17, 1953, as I remember. Before, I thought the witness said he talked to Mr. Olday before he signed the bond about that—the condition precedent. However, he says he doesn't remember and he is the one that should testify, not me.

Q. Did you testify on direct examination that you talked to Olday before you signed this contract on December 17?

A. I believe that is correct, now that I think of it, yes.

Q. You're pretty sure of that now? [213]

A. I'm pretty sure, yes.

Q. Did you testify on direct examination to the effect that you had a "run-in" with Hager and you "went to bat," using the term of "going to

(Testimony of Stuart E. Tope.)

bat," was arguing it out? Did you so testify on direct examination? A. Yes.

Q. What did you mean?

A. Well, that's arguing about it.

Q. Well, did you have much trouble with Hager?

A. Not a whole lot.

Q. What was the trouble about?

A. Well, he was running the job and that was it.

Q. You had trouble with him over that?

A. Yes, sir.

Q. When you say, "went to bat" do you mean that you merely argued with him over who was going to run the job?

A. Well, the way the operation was going——

Q. You argued with him then over the way the operation was going? A. Correct.

Q. Well, how did you think it should go?

A. Well, if I was allowed to run the job, I think I could have made it go a whole lot faster. [214]

Q. You thought you were a better man for the job than Hager?

A. After seeing his operation, yes.

Q. I take it, you didn't think very much of Hager?

A. Well, he's all right in his place, I guess.

Q. But that wasn't his place?

A. I don't believe it was.

Q. Well, didn't you say that you had so much trouble with Hager that you took the matter up with Oaks? A. Yes.

(Testimony of Stuart E. Tope.)

Q. Was that, again, over who was going to run the job?

A. It was—I just told Hager who was going to run the job and that was it.

Q. That is not what I asked you. What I asked you was whether or not the matter you took up with Oaks was the question of who was going to run the job? A. That's right.

Q. And you felt you should?

A. Well, I thought I should, yes, being foreman.

Q. Were you glad when Hager left?

A. I won't say that, no.

Q. Did you testify on direct examination that when Abbott came on the job things were just the same [215] as they were when Hager was on the job? A. Just about the same.

Q. Did you have to "go to bat" with Abbott too?

A. I gave up from there, when Abbott came on the job.

Q. Then, you didn't have to "go to bat" with Abbott? A. There was no use.

Q. Well, did you have to—— A. No.

Q. You didn't then? A. No.

Q. Did you have any words with Abbott?

A. Not that I can recall.

Q. You got along fine with him, then?

A. As far as I know, yes.

Q. Hager was the only one that you had any trouble with? A. That's right.

Q. How about Mr. Crawford?

A. I got along with him to a point, yes.

(Testimony of Stuart E. Tope.)

Q. What point was that?

A. Well, that was after the job was over.

Q. You got along fine all through the job?

A. Yes, I wouldn't say real fine, we argued considerably.

Q. What did you argue about? [216]

A. Oh, the berm, mostly, of tramping the berm down. I asked him to be able to move up into a better area around this rocky area and he refused to let me go.

Q. You say you argued considerably with him?

A. Yes.

Q. How did you think that right of way should be cleared, Mr. Tope?

A. At one time I suggested to Mr. Noonan that the berm should have been piled.

Q. Well, now, just a minute, now my question is: How did you think the right of way should be cleared? I don't care who you told about it, I just want to know how you think it should be cleared?

A. It should have been—the berm should have been made and—well they should have slicked out thirty feet of that run right of way and the debris was to be piled in a berm, but not walked down, tramped on, in other words; and that should have been done all the way through the whole thing until the summer time and then started back and walked your berm down. The way it was done, it was put into a berm with all this snow in there and this tundra and the tundra [217] acted as an insulation and I went up there two years later and uncovered a pile and there was snow still under it.

(Testimony of Stuart E. Tope.)

Q. How did you think that overburden should be knocked down? Anything wrong with the way they did that; you objected to the way they piled it upright?

A. Well, the way that they asked you to walk it down with the equipment when you couldn't even get up on the piles.

Q. You objected to the packing, did you object to anything else? A. Yes.

Q. What?

A. I objected to working in that rock pile and going around to a better area and then coming back and working that when the snow was melted down, yes, I did that.

Q. Did you have any special ideas on how to get that overburden off?

A. Well, there was one way of doing it and that was just with the cats.

Q. Well, you can——

A. You mean in the rocky areas, is that what you are referring to? [218]

Q. No, I am speaking of the over all section.

A. Just with the cats is all.

Q. Well, aren't there different ways of using the cats?

A. Yes, there are. You could have walked it down and then angled your blades and pushed it off to the sides.

Q. What do you mean——

A. And you could have taken it and just knocked it over as you went and pushed it off to the side.

(Testimony of Stuart E. Tope.)

Q. In any event you used the blades to knock it down? A. That's right.

Q. Did you place a bid on this section of the line? A. Did I place a bid on it?

Q. Yes. A. Yes, I think I did.

Q. How much did you bid?

A. Six and a half cents a foot.

Q. Did you bid it on any particular section or did you just bid for a hundred miles?

A. I bid on the section of between Tog and Big Delta.

Q. The section you got?

A. Yes, 96 miles, I believe. [219]

Q. How did you come to choose that section?

A. Well, at first, they thought it was a much easier section to do.

Q. Well, how did you come——

A. Well, that's exactly what I'm saying. I figured that that was a pretty easy section to go through.

Q. You thought it was easy?

A. Yes, and I walked up part of it, and flew over it once and it didn't look too bad, but I run into complications that was in the rocky area.

Q. Well, now, did you fly over the rest of it in choosing this particular section?

A. No, I didn't.

Q. This is the only section you flew over?

A. That's right.

Q. Well, I don't understand that, Mr. Tope. If you were trying to pick the easiest section, why did

(Testimony of Stuart E. Tope.)

you fly over just one? A. Pardon?

Q. If you were trying to pick an easy section, why did you fly over just one?

A. Just once?

Q. Just one section?

A. Just one section? [220]

Q. Yes.

A. Well, because I was—Mr. Oaks told me that would be the easiest section on the whole line.

Q. So that is the reason you chose it?

A. It's possible.

Q. Is it? A. Not altogether.

Q. Now, what milepost did you begin?

A. I do not know.

Q. It was Tok, was it not?

A. Yes, it was a few miles out of Tok.

Q. Which way? A. North.

Q. Northwest?

A. Yes, at the start of the job it would be northwest, yes.

Q. You said you had 96 miles?

A. I believe that is what was on the plans, yes.

Q. And you began about how many miles northwest of Tok?

A. At Tok Junction—I believe there was around about five or six miles; I couldn't tell you exactly.

Q. And how far did you go before you hit this rocky area?

A. Around twelve to fourteen miles, somewhere in there. [221]

Q. And didn't you testify that that continued

(Testimony of Stuart E. Tope.)

for about five miles? A. The rocky area?

Q. Yes.

A. No, I believe I said it went longer than that. I figured it was around seventeen miles.

Q. Is that your testimony now? How long was the rocky area? A. I'd say 17 miles.

Q. And that ended about where?

A. Robinson River, maybe just a little beyond.

Q. Where is Robinson River with respect to Dot Lake?

A. Well, Dot Lake is about 50 miles from Tok Junction—50 or 55, somewhere in there.

Q. Well, did you clear from where you started and worked west of Tok Junction and work all the way to Dot Lake?

A. One piece of equipment went on into Dot Lake.

Q. By the time you got to Dot Lake you only had one cat left? A. That's right.

Q. But did you clear that area from Tok Junction to Dot Lake?

A. It was cleared, yes. [222]

Q. I know it was cleared, but did you clear it?

A. Well, I just don't understand your question; I really don't.

Q. Did you clear the area between Tok Junction or about five miles northwest of Tok Junction and Dot Lake?

A. Well, there was one cat that broke down and I had only one cat left and they brought some more cats in and Mr. Abbott was running that job.

(Testimony of Stuart E. Tope.)

Q. I'll put the question this way: Did your cats clear the area——

A. One of them did, I know.

Q. Let me finish the question, please. Did your cats clear the area between Tok Junction and Dot Lake?

The Court: What is the name of the lake?

Q. Dot, D-o-t, your Honor.

The Court: Is that the end of the 96 miles?

Q. No, sir.

A. They cleared up until they broke down, yes, and one went all the way to Dot Lake.

Q. I'll repeat the question. Did your cats clear the area from Tok Junction to Dot Lake? [223]

A. They cleared up until they broke down.

Q. Will you read the question back to him please?

(The last question was read by the Reporter.)

The Court: I think we understand the question whether or not your cats cleared the area up until Dot Lake, and you said until they broke down. Was that near Dot Lake?

A. Until we broke down there was one cat that did finish up to Dot Lake.

Q. Well, your Honor, he hasn't answered the question yet.

A. But there was other cats that was brought in, yes.

Q. These cats cleared the area with the help of this one cat, with the help of two others that they brought in, they did clear the area up to Dot Lake?

(Testimony of Stuart E. Tope.)

A. That's right.

Q. Well, then cats other than yours were used to clear the area between Tok Junction and Dot Lake?

A. With the help of this one that was left, yes.

Q. Will you please just answer my question, Mr. Tope? Now, those questions can be answered yes or no. Did cats other than your own aid in clearing the area between Tok Junction and Dot Lake? [224]

A. Yes.

Q. How many?

A. There was two extra cats brought in to clear the area from there to Dot Lake.

Q. Did any of your cats go beyond Dot Lake?

A. One.

Q. How far did it go?

A. I think they called it Shaw Creek, is where the two different ends met; almost to, well, it was between Dot Lake and Johnson River.

Q. How far beyond Dot Lake approximately did that cat go? It went beyond Dot Lake about how many miles?

A. I am guessing at this; I would say eight miles.

Q. Now, you lost one at Robinson River?

A. Just on the other side of Robinson River about a mile, yes, north of Robinson River.

Q. Where did you lose the other?

A. The first one was lost at Cathedral Bluff.

Q. The second one was lost at about a mile beyond Robinson River. Well, now, is this true, Mr.

(Testimony of Stuart E. Tope.)

Tope: That one of your cats operated from a point about five or six miles northwest of Tok Junction to a point about eight miles northwest of Dot Lake?

A. Yes. [225]

Q. Is it true that another of your cats operated from the same point northwest of Tok Junction to a point about one mile north of the Robinson River?

A. That is right.

Q. Is it true that the third of your cats operated from the same point northwest of Tok Junction to a place called Cathedral Bluff?

A. Yes, beyond Cathedral Bluff, yes, or right at Cathedral Bluff, I would say, yes.

Q. Is that the only place that those cats worked on this job? Does that cover the areas they worked on?

A. That's right.

Q. Now, these Oaks' invoices that Mr. Hubbard had, how often did you get one of those?

A. Every week.

Q. Did you ever object to any of them?

A. No, sir.

Q. Did you from time to time receive what were called "statements" to the effect that so much money was earned and that the cost incurred in clearing so much as had been cleared to so much amount?

A. I never received any from him, no. [226]

Q. Do you understand what I am asking about now? Did you ever receive any statements where Oaks claimed you owed him money?

A. Yes, I believe I did.

(Testimony of Stuart E. Tope.)

Q. How many times?

A. I just don't know.

Q. More than once?

A. I just don't know.

Q. Do you have any of them?

A. Pardon?

Q. Do you have any such claims or statements wherein Oaks contends that you owe him money?

A. If they are they're in those records there of—that Mr. Nesbett has.

Q. Are there any in those records?

A. I don't know.

Q. Did Oaks tell you he was going to carry the payroll? A. Yes, he did.

Q. Well, didn't you testify on direct examination that you didn't make any agreement to pay Workmen's Compensation or Employment Security Commission taxes and stuff like that?

A. Would you repeat that, please?

Q. Did you not testify on direct examination that you made no agreement to pay Workmen's [227] Compensation costs, Employment Security Commission taxes, and similar things, charges relating to a payroll?

A. I never made any agreement, no.

Q. You made no agreement to pay them?

A. No.

Q. Who did you think would pay them?

A. Well, I imagine Mr. Oaks would have to pay them.

(Testimony of Stuart E. Tope.)

Q. Well, it would follow then, if he is going to carry for the payroll that he would pay those taxes?

A. Beg your pardon?

Q. Would it not follow that if he was carrying the payroll he would carry the taxes and other charges too? A. He would have to, yes.

Q. So you thought he would pay them? Is that correct?

A. I am sure he would if he was carrying the payroll.

Q. Now, let's go to your testimony concerning Mr. Harlan, Mr. Tope. I find that somewhat confusing. Did you testify that you tried to hire Harlan and could not? A. After Mr.—

Q. Did you so testify on direct examination? [228] A. Yes.

Q. Now, was that your first attempt to employ Mr. Harlan? A. Yes.

Q. Now, did you try after that? A. Yes.

Q. To employ him? A. Yes.

Q. And did you employ him after that?

A. Yes, I employed him for about a week.

Q. And you did? A. Yes.

Q. And you employed him for about a week?

A. Yes.

Q. Do you know when, by any chance?

A. When?

Q. Yes?

A. I can't give the exact time, no.

Q. What did you ask him to do? What was he employed to do?

(Testimony of Stuart E. Tope.)

A. Well, there was a tractor down with a blown piston.

Q. To repair a cat then?

A. That's to repair a cat.

Q. Did you ever employ him again?

A. Once again, for about three days, until a replacement [229] came down from Fairbanks.

Q. To do what?

A. To take over this cat.

Q. To operate it? A. Yes.

Q. Are those the only times you employed him, those two times?

A. That's the only times.

Q. And now, was the first time that you tried to employ him and couldn't, the only time that you tried to and didn't? A. That's right.

Q. You said he wasn't paid?

A. No, he wasn't.

Q. Well, now then, you knew these McLaughlin cats and these Babler-Rogers' cats were on the job, did you not? A. Yes, I did.

Q. Did you explain about that?

A. No, I didn't.

Q. Did you make any comment at all concerning their presence? A. I can't recall.

Q. Did you welcome their presence?

A. I could have. [230]

Q. Did you ever try to hire those McLaughlin cats, yourself?

A. Yes, I believe I did.

Q. How many did you try to hire?

(Testimony of Stuart E. Tope.)

A. I think I tried to hire one to replace the one that blew the motor.

Q. Just one? A. That's all.

Q. Who did you talk to about that?

A. I believe it was Mr. Heck.

Q. He let you have it?

A. He says, "No, you are not going to put it in that rock pile."

Q. How many cats did you have at the time you tried to hire this one from McLaughlin?

A. Running?

Q. How many operating—that's right.

A. I believe there was two.

Q. Now, you testified on direct examination, did you not, that you stayed on that job until it was finished? A. And beyond that.

Q. And for how long did they pay you your so-called "foreman's wages?"

A. Well, that ended around the first of April, sometime [231] in April, I couldn't tell you exactly, I just don't know.

Q. Well, what were you doing?

A. Well, seeing if I couldn't get some parts for the cats and come down there; the cat was working, my truck was working there, my pickup was running and they were using it and I was trying to use the station wagon.

Q. I am not asking you what they were doing. What were you doing?

A. I was just going up and down the line.

Q. You were riding up and down the line?

(Testimony of Stuart E. Tope.)

A. That's right.

Q. You never did leave the job?

A. I had to go to Fairbanks, yes.

Q. For parts, too?

A. That is right, parts.

Q. And you never pulled your equipment off the job?

A. Yes, I did. About a week before the job finished, I refused to let them use it any more.

Q. Now, that would be about April 24?

A. Somewhere between there and—no, I would say—it was around May 1.

Q. And that was one cat?

A. That's the best that I can recall, yes, and the [232] truck and the pickup.

Q. That is the Dodge truck?

A. That is right.

Q. That's that GMC pickup?

A. That's right.

Q. Well, then from April 1 to May 1, you as an individual were just riding up and down the road. That's your testimony, isn't it?

A. Well, I brought some parts back, I'm positive I did that.

Q. Didn't you testify a minute ago that you were just riding up and down the road?

A. Well, yes, I was checking the job, if that's what you mean, what my equipment was doing, what my cat was doing, yes.

Q. You were checking the job then when you were riding up and down the road?

(Testimony of Stuart E. Tope.)

A. That's right.

Q. And why did you pull your equipment off?

A. Well, I hadn't received any foreman's pay and hadn't received any estimates from Mr. Oaks, so there was only one other thing left to do, and that would just beat my equipment to death as it was, so I just pulled it off.

Q. Well, what estimates did you expect? [233]

A. Well, I expected, at least, some compensation of some kind.

Q. Well, you said you hadn't received any estimates?

A. Yes, for the—well, for any monies to be paid to the N. C. Company for the rental, I received nothing.

Q. Will you read that answer back to me, please?

(The last answer was read back by the Reporter.)

Q. If they had been paid to the N. C. Company, naturally, you wouldn't receive them, Mr. Tope. What did you expect in the way of estimates?

A. Well, monies to compensate the time that the cats were on the job.

Q. What is an estimate?

A. As in construction language, well, you could take an estimate on their hourly basis or under a contract basis.

Q. You could, huh? A. Why certainly.

Q. Well, now, were you fired as a foreman?

A. Nobody fired me that I know of.

(Testimony of Stuart E. Tope.)

Q. And you never quit?

A. No, and I was never fired.

Q. They just stopped paying you?

A. That's all. [234]

Q. Now, after you lost your second cat at Robinson River, when was that—when did you lose that cat at Robinson River?

A. Well, the exact time, I can't tell you just when it was. You'll have to look at—

Q. Well you got some idea, haven't you, Mr. Tope?

A. No, I haven't.

Q. You have no idea?

A. No idea.

Q. Well—

Mr. Nesbett: If the witness had been permitted to answer the question, he would have told him how to find it.

Mr. Dunn: How can I find it, Mr. Tope?

A. Well, from Mr. Oaks' invoices, whatever they are.

Q. And the ones that you gave him—excuse me, the ones he gave you?

A. The ones he sent to me, yes.

Q. Where are they?

A. I don't know, I guess they're on Mr. Nesbett's desk.

Q. Or has Mr. Roberts got them?

A. Well, he could have, I don't know what he took out of here.

Q. Do you have those invoices with you? [235]

Mr. Nesbett: I thought he was going to say, "Look at Exhibit 2." It will show when a cat went

(Testimony of Stuart E. Tope.)

completely out of action last time he charged rental on it. That would indicate when it went out of action.

Q. I hand you Plaintiff's Exhibit—excuse me, what is this?

The Clerk: It's 2 for identification.

Q. I hand you Plaintiff's Exhibit 2, can you tell me from that some way when you lost that cat at Robinson River?

A. The one cat—that is February 13, and the other cat——

Q. I am interested only in the one at Robinson River; that was the second one you lost, isn't it?

A. Yes.

Q. It says here, "April 3." Well, now what did you do between April 3 and May 1? What did you do?

A. Well, as I said, I went up and down the pipeline and went to Fairbanks.

Q. You weren't foreman on just one cat then?

A. Well, you could say that, yes. I wasn't even foreman on that, Mr. Abbott was taking charge of that; Mr. Abbott had charge of that cat. [236]

Q. Well, you didn't have charge of any cats after April 3, then?

A. After Mr. Abbott came on the job, I didn't have any chance of—I had no direction of any of the equipment then.

Q. It was better under Hager?

A. Not with Hager either.

Q. Then, you never did have——

(Testimony of Stuart E. Tope.)

A. Nothing. I don't know what I was on as foreman for in the first place, other than to receive some money to live on, that is about all.

Q. Do you know why you were being paid?

A. When I wasn't running my own job, I guess I wasn't being paid.

Q. You got the money, didn't you?

A. Yes.

Q. But you don't know why?

A. I don't know why.

Q. You kept it? A. Yes.

Q. When you said you don't know why they paid you when you weren't running your own job, didn't you? A. Would you read——

The Court: I didn't understand that question. [237]

Q. I said, you said they paid you when you weren't running your own job, didn't you? Well, did you think you ought to be paid when you weren't running your own job?

A. You would have to repeat that, now.

Q. Did you think you ought to be paid when you weren't running your own job?

A. No, I don't think so; I wouldn't do it.

Q. Do you think you should have run your own job?

A. If I was left to run it, I should have, yes.

Q. They interfered with it?

A. Yes, they did.

Q. But you don't think they should have, is that right?

(Testimony of Stuart E. Tope.)

A. They should not have, that's right.

Q. Mr. Tope, I have asked for various documents, do you have here, the minute book of Stuart Construction Company?

A. I think Mr. Nesbett has it there.

Q. May I have it? (Mr. Nesbett handed it to him.) Are you familiar with this, or would you like to take a look at it before I ask you some questions on it?

A. I would like to look at it, yes. [238]

(The book is handed to the witness.)

A. That's enough.

Q. Is that the minute book of Stuart Construction Company, Inc.?

A. That is the minute book of Stuart Construction Company.

Q. Is that all of the minutes relating to this corporation?

A. Mr. Sanders prepared this and he kept track of this book.

Q. Is that all of the minutes relating to Stuart Construction Company, Inc.?

A. I'm pretty positive that they are.

Q. Now, when I took your deposition, Mr. Tope, you told me that when you said "pretty positive" you meant positive. Does that still stand?

A. Well, I should say, yes.

Q. Well, you are positive?

A. I am pretty positive that is it.

Q. You are, and "pretty positive" means positive, is that right?

A. Well, that's good enough, yes.

(Testimony of Stuart E. Tope.)

Q. Now, I guess I better leave this up here. Mr. Tope, under the minutes of this corporation, what limitation was placed upon you as an [239] individual? In what way were your powers limited?

Mr. Nesbett: Your Honor, I'll ask that he be shown the minutes with respect to each question.

Mr. Dunn: I didn't quite catch——

Mr. Nesbett: I ask that he be shown the minutes with respect to each question.

Mr. Dunn: I will be glad to comply with that. (Mr. Dunn showed the witness the book again.)

Q. (By Mr. Dunn): Would you like for me to repeat my question, Mr. Tope, or do you remember it? A. Pardon?

Q. I asked whether or not you remembered my question or——

A. No, I would like to look at this some more, please, if I may?

Q. I don't mind.

The Court: Now, your question?

Q. What limitation, if any, is placed upon your power by virtue of those minutes?

A. President of the corporation.

Q. You are limited to being president?

A. Well, it was voted here, it states it was voted [240] into one, the secretary and president.

Q. I'll repeat my question. What limitation is placed on your power by virtue of those minutes? Do those minutes say that there is anything that you cannot do with respect to Stuart Construction Company, Inc.?

(Testimony of Stuart E. Tope.)

A. No, not that I can see in here.

Q. Does it say there is anything you can do?

A. No, it doesn't.

Q. Can you find there, Mr. Tope, minutes of a meeting of the Board of Directors held November 17, 1952? A. November 17, 19——

Q. That's what I meant to say; I assume that is what I said, November 17, 1952, Board of Directors' minutes. Well, your Honor, I can save time possibly by merely offering this in evidence.

The Court: Yes.

Q. It will speak for itself if it's admitted.

The Court: Is that a board meeting in November, 1952, or '53?

Q. It's——

The Court: Board meeting of November of '53 was close to the time of this contract is all. [241]

Q. No, '52, your Honor.

The Court: Have you got it in mind there so that it would shorten it up; that would——

Q. Your Honor, I would like to offer it in evidence, the minutes of the meeting of the Board of Directors, November 17, 1952, April 1, 1953, September 17, 1953, and April 1, 1954.

The Court: Well, I take it, your question all refers to his authority under it as president of the corporation?

Q. Question his authority?

The Court: I would just infer that from your questions.

Q. Not quite, the contrary. The minutes show

(Testimony of Stuart E. Tope.)

that he had unlimited authority, that he can do anything he wants to do.

The Court: That's what I said; I take it is related to his authority.

Q. Oh, related to his authority, I thought you said, "questioned his authority." I misunderstood you, I am sorry.

The Court: Is there any issue here but that he had unlimited authority as president of the corporation? [242]

Mr. Nesbett: I don't know of any up until now; I can't see that it makes any difference.

The Court: I don't believe it does up until this time. And I assume that he would have had the usual powers of an executive.

Mr. Nesbett: With exception of possibly the minutes of April of 1954, which I haven't seen; I don't see that any of the others are relevant, they're long prior to the times involved.

The Court: Counsel wants to show that he had unlimited authority and I think we can assume that the executive of a corporation is presumed to have power, usual power of executives.

Mr. Dunn: Yes, your Honor.

The Court: So I think we can proceed upon the theory that he had the usual powers and if the question arises that whether he was limited in his authorities, why then it would make these questions competent.

Mr. Dunn: Your Honor, what I am trying to

(Testimony of Stuart E. Tope.)

show is that he had unusual powers, but extraordinary powers. [243]

The Court: Suppose you proceed upon that theory and then if that is challenged, why then you can offer these records. I don't know whether that would become competent at this time; I assume when you offer it somewhere along the line, you would be able to want to establish that fact.

Mr. Dunn: Well, I have already pointed out, Your Honor, and I understood you wanted to cover all of these things at one time, that we are attacking the corporate structure here; we are saying it's merely an alter ego of Mr. Tope.

The Court: That wouldn't bear on the question of validity of the corporate structure of what authority he had, on the contrary it would assume he had authority and clothed him with authority as an executive of the corporation.

Mr. Dunn: Oh, but within reason, Your Honor, that is what I am trying to show by these minutes, that goes beyond the normal authority for a president of a corporation. That there is no difference between Tope acting as an individual and Tope acting for Stuart Construction Company. In other words—— [244]

The Court: You go ahead in your way and show it.

Mr. Nesbett: Does Your Honor feel they ought to be admitted now, then?

The Court: Well, I think that it would be good enough to call the attention to the extraordi-

(Testimony of Stuart E. Tope.)

nary powers that he might have and I don't know whether that would militate against the validity of the corporation at all or not, but let's assume he had extraordinary powers beyond the usual executive authority of the corporation; let's assume that. And that——

Mr. Dunn: Well, Your Honor, I prefer not only to assume it, I would like to have it in the record.

The Court: Well, let's put it in the record. Let's say it, now that he had the powers——

Mr. Nesbett: All right, Your Honor, Mr. Dunn has photostats, surley he won't mind putting those in evidence rather than take the original here?

Mr. Dunn: Your Honor, I'd have to tear my deposition apart. May I see the deposition? [245]

The Court: Suppose you just read it into the record, what you want to show there. It ought not to require all of the minutes of the stockholders board of directors to show extraordinary powers; there ought to be something in there to indicate that.

Mr. Dunn: Mr. Tope, I call your attention to the minutes of the meeting of the directors held November 17, 1952, and, specifically, to the last full page—full paragraph, I beg your pardon—beginning on page 2, the second page; the one that begins with the words “after consideration.” Have you found that?

A. You said on page 2?

Q. Yes, the second page.

(Testimony of Stuart E. Tope.)

A. Second page.

The Court: Did you find—could you find it and read it, and read what you want into the record, without having him search for it?

Q. Without having him identify it, Your Honor?

The Court: Well, it is already identified; you're at liberty now to read into the record what you say these minutes show, and of course, you understand that the Board of Directors could not clothe him with authority [246] beyond the authorization of the charter of the corporation.

Q. Well, Your Honor, if I just—maybe—I feel like I am being very silly here, but if I merely read this into the record without having Mr. Tope identify it—

The Court: He has already identified it. These are the minutes of the corporation. Now, then whatever they are, and counsel may know, go up in evidence. Now my suggestion is to shorten it up to read what you want into the record.

Mr. Dunn: Well, Your Honor, it seems to me I'm testifying.

The Court: Well, go ahead in your way, I am trying to shorten it up, but can't do it.

Mr. Dunn: That is what I wanted to do when I offered the minutes themselves rather than read it, Your Honor.

Q. (By Mr. Dunn): Can you find the minutes of November 17, 1952?

The Court: Why can't you find it?

Q. Yes, that's a good question, Your Honor.

(Testimony of Stuart E. Tope.)

(Mr. Dunn found them.) [247]

Q. Mr. Tope, I invite your attention in your minute book, to the minutes of directors of November 17, 1952, to the second page thereof, and, specifically, the paragraph beginning with the words "after consideration." Do you see the place I mean? A. Yes.

Q. I am going to read that paragraph to you. "After consideration of the question of management of this corporation, it was moved by Donald F. Maynick and seconded by Bertha Tope that the officers immediately take their positions and that the President, Stuart E. Tope be authorized to manage the corporation and that he be fully authorized to bind the corporation by any means whatsoever that he may think fit in the performance of his duties as President and General Manager of the corporation, and since the said Stuart E. Tope will spend considerable time away from home, and away from Anchorage in pursuit of his duties, as manager of the corporation, that the corporation pay Mr. Tope's room and board and for all other expenses in connection with travel and domiciling away from home, and that Mr. Tope be paid [248] \$250.00 per week as wages while the said Stuart E. Tope was actually doing work on construction jobs for the corporation, in his capacity as manager. The motion was put before the house and all members voted in the affirmative and the President declared the motion duly carried."

(Testimony of Stuart E. Tope.)

Q. Did I correctly read the paragraph of those minutes? A. That is correct.

Q. Now, I invite your attention——

The Court: It's the same there after—this is just the same in other meetings.

Mr. Dunn: I am not sure, Your Honor, as a matter of fact——

The Court: Well, read it.

Q. (By Mr. Dunn): I now invite your attention to the next to the last paragraph of those same minutes, and I read it to you: "It was moved by Bertha E. Tope and seconded by Donald F. Maynick that Stuart E. Tope and Bertha Tope each be authorized to sign any and all checks on behalf of this corporation on the monies that they may choose to place in any bank in Anchorage, Alaska. The motion was put before the house and all of [249] those present voted in the affirmative, whereupon the President declared the motion duly carried." And I ask you if I read that paragraph correctly? A. That is correct.

Mr. Dunn: No, there is a difference, Your Honor, on these.

The Court: Very well.

Q. (By Mr. Dunn): I invite your attention to the minutes of the meeting of directors of April 1, 1953, and, specifically, to the paragraph approximately at the middle of the page, and I now read: "Move that Stuart E. Tope remain as a General Manager of the corporation business. With full power and authority to handle any and every trans-

(Testimony of Stuart E. Tope.)

action confronting him at any time concerning the business of this corporation and with full power to bind, and obligate this corporation in any way that he may see fit."

Q. And I ask you whether or not I read that correctly? A. That it correct.

Q. I call your attention to the minutes of directors of September 17, 1953; the next to the last large paragraph, and I'll now read: "Whereupon the motion was duly made and carried that [250] Stuart E. Tope, as General Manager, be given full power and authority to negotiate a contract with any company, corporation partnership, or individual for any type of construction or clearance work, and that said manager's powers should be unlimited in scope. And he is authorized to sign any and all instruments necessary to carry on the general contracting, construction, excavating, or clearance work."

Q. And I ask you whether or not I read that correctly? A. That's correct.

The Court: You said there was minutes of September, 1953?

Q. That's right, Your Honor.

Now, in the minutes of April 1, 1954, of the directors, I call your attention to those and the fourth paragraph from the bottom, and ask you whether or not there is not a similar provision in those minutes that continue your unlimited powers to bind this corporation? Is there such a provision?

A. Yes.

(Testimony of Stuart E. Tope.)

Mr. Nesbett: I'd like to—I wonder if it could be read, Your Honor?

Mr. Dunn: I would be glad to read it. [251] I call your attention to that paragraph that I just referred to and I now read: "Moved that Stuart E. Tope remains the General Manager of the corporation business with full power and authority to handle any and all transactions confronting him at any time concerning the business of this corporation and with full power to find, bind, and obligate this corporation in any way that he may see fit." And then continuing—I beg your pardon, did I read that paragraph correctly?

A. The fourth from the bottom you did, yes.

Q. Is that preceded by the following words: "The following motions were duly made and carried."? A. Yes.

The Court: It is now five o'clock, Mr. Dunn, may we——

Mr. Dunn: May I ask one more question, please?

The Court: Yes, you may.

Q. (By Mr. Dunn): It will help me in starting tomorrow. Mr. Tope, I hand you Plaintiff's Exhibit 3 and ask you whether or not these are the working hours for the tractors and the rental claim for your [252] automobiles, trucks and station wagon, on which your claim is based?

A. Take it from Mr. Oaks' records, to the best of my knowledge, these are the hours.

Q. Well, do you base your claim on these hours?

A. Yes.

The Court: I think that has been answered in the evidence here before, that he based his claim——

Mr. Dunn: I don't think he did, Your Honor.

The Court: Well, let's go ahead, let's not argue the matter. Let the Court stand in recess until ten o'clock tomorrow morning.

(The Court recessed until Wednesday, August 13, 1958.) [253]

(The trial was continued.)

August 13, 1958.

The Court: Gentleman, are you ready to proceed with the case on trial?

Mr. Nesbett: Yes, sir.

Mr. Dunn: Your Honor, I have prepared something that I thought might be of use to you, which if Mr. Nesbett has no objection to, I am perfectly willing to give you, merely for informational purposes. It is not evidence, what it is, it's a road map of Standard Oil Company, I think that is who put it out—yes, also a list of names with mileposts opposite each name, telling you where on the Highway that particular place is. I don't know if you need—I thought it might be of aid to you in keeping these various places straight.

The Court: If Mr. Nesbett is satisfied that it accurately defines the Highway. Up to this time I have had no use for it.

Mr. Nesbett: I have no objection at all, your Honor, if it will help——

The Court: If it appears to be effective you can call my attention.

Mr. Nesbett: Yes, sir.

The Court: All right, Mr. Dunn.

Mr. Dunn: I mentioned this earlier, Sir, I am sorry I forgot about it. [255]

Mr. Dunn: Before I proceed with cross-examination, I would like, if you will bear with me, to explain my position as to what I am trying to get at. I feel there is some confusion here.

The Court: Well, I don't believe there is any confusion, but then I—up to this time, I am not, would not appreciate what you're trying to get to, because clearly, the corporation may be guilty of irregularities, but that does not destroy its corporate entity; I am not saying the many records you offered in evidence clutters up the record; I am not saying that that is not in accord with usual authority that is granted to a management, but if they exceed the authority of the corporation, it is merely ultra vires. Now, that is all, it doesn't destroy the corporate entity, but its ultra vires. I am not saying it has even ultra vires to clothe with full power, although they could clothe them with full power under the authority, that is all, and if he did act beyond it, why he was guilty, that is the corporate, the operators, ultra vires of it, but the corporate entity is just the same. Now, there is no issue here as to whether this man received corporate right at all; there is no issue of that sort. Either there was a corporation or there wasn't one and we ought to immediately

find out whether it was a corporate entity at the time. [256]

Mr. Dunn: That is what I am getting at.

The Court: This will not help us in determining that question.

Mr. Dunn: My feeling is that was one of a number of elements to be considered.

The Court: I don't think it would be even an ultimate to consider whether it was a corporate entity or not. The very fact that the stockholders would authorize somebody to do something, it might or might not be within the corporate authority.

Mr. Dunn: Very well, Your Honor.

STUART E. TOPE

resumes the stand in cross-examination.

Cross-Examination

By Mr. Dunn:

Q. Mr. Tope, you testified, did you not, that you spent a considerable amount of time riding up and down the highway after the first of April and prior to that time, going for parts and things of that nature? A. Yes.

Q. During the course of your travel up and down the highway, did you have an occasion to observe the sections of the line in Alaska other than the ones on which you worked? A. Yes.

Q. Did you form any opinions as to the difficulty of [257] clearing those sections as compared to your own? A. I don't believe so.

(Testimony of Stuart E. Tope.)

Q. You still think your section was the easiest, then?

A. I wouldn't say it was the easiest, it came out later on that it was the toughest, I believe.

Q. You think your section was the hardest?

A. Yes.

Q. Who, Mr. Tope, is Donald Maynick?

The Court: Donald who?

Q. Maynick, M-a-y-n-i-c-k, is it not, Mr. Tope?

A. That is right.

The Court: Now, the first name, I am sorry?

Q. Donald.

The Court: Donald Maynick, very well.

Q. Who is he, Mr. Tope?

A. He is a brother-in-law.

Q. Your brother-in-law? A. Yes.

Q. That would be the brother of your wife?

A. That's right.

Q. Is Mr. Sanders still a stockholder in Tope Construction Company here?

A. I just can't tell you that, I just don't know.

Q. I hand you this book and ask you if this is the [258] official minute book of Tope Construction Company, Inc.?

The Court: It was identified yesterday, wasn't it, as the official minute book?

Q. It was, Your Honor, but I want to tie it to what I am showing him now.

The Court: As I said, it was already identified, so you have a right to find out anything you want to.

(Testimony of Stuart E. Tope.)

A. Yes.

Q. What is the date of the last minutes?

A. October 25, 1954.

Q. Is that a meeting of the board of directors?

A. Yes.

Q. Does that authorize you to bring suit against Oaks Construction Company? Do those minutes so authorize you? A. Yes.

Q. Your Honor, to avoid—to save time I would like to offer these into evidence rather than reading them into the record.

The Court: Whether you read them or not they will then be in the evidence; they will be in the record. I am indifferent about it.

Mr. Nesbett: I have no objection. [259]

Mr. Dunn: I so offer these minutes.

The Court: Defendant's exhibit what?

The Clerk: Defendant's C.

The Court: What?

The Clerk: Defendant's C.

The Court: You should read the paragraph you want me to note so I can know what it is.

Mr. Dunn: Yes, Your Honor.

The Court: You may not read them all, but just the paragraph that you——

Mr. Dunn: "Upon motion duly made and carried, the Board of Directors authorized and empowered the president and general manager, Stuart E. Tope, to retain legal counsel and furnish all costs and expenses necessary to file suit against any and all parties necessary in order for the corpora-

(Testimony of Stuart E. Tope.)

tion to effect collection on the contract made with the Oaks Construction Company, dated December 17, 1953."

The Clerk: Is this for identification?

Mr. Dunn: No.

Mr. Nesbett: Those are of what date?

The Court: October 25, I believe, it is.

Mr. Dunn: Yes, His Honor is correct. [260]

The Court: Suit was filed in February of 1955, that is, I am reading now from the filing mark.

Mr. Dunn: Now, Mr. Tope, I return the minute book to you and ask you if it contains the by-laws of this corporation?

A. It says, "By-Laws of the Stuart Construction Company, Incorporated."

Q. Are those the by-laws of the Stuart Construction Company?

A. Yes, I guess they are: it says so that they are.

Q. I invite your attention to Article II, Section 1, of those bylaws, and ask you whether or not that sets the time for an annual meeting of this corporation?

A. Yes.

Q. And what is the time so set?

A. Two o'clock in the afternoon.

Q. On what date?

A. On the 17th day of November.

Q. Is that the annual meeting of the stockholders?

A. Yes.

Q. Now, will you please examine that minute book and tell me how many annual meetings have been held on that date? Your Honor, again, time

(Testimony of Stuart E. Tope.)

can be saved merely by offering this entire minute book. [261]

The Court: Very well, suppose you do that. You know what——

Mr. Dunn: I so offer it.

Mr. Nesbett: I have no objections, your Honor, I think though if counsel wants it in evidence we can stipulate now that the entire minutes and by-laws offered into evidence be photostated and substituted for the original, and the original returned to the corporation.

The Court: I think that is the usual practice.

Mr. Nesbett: At Mr. Dunn's convenience, of course.

Mr. Dunn: That can be done, or they can be withdrawn subsequent to the trial, your Honor.

The Court: Yes.

Mr. Dunn: Can we also stipulate that the entire minutes and everything contained in the minute book become Defendant's Exhibit C, rather than merely that one page?

Mr. Nesbett: That is all right with me.

Mr. Dunn: For your Honor's information, I would like to state, if I may, as to what minutes concerning annual meetings are set forth in that minute book. [262]

The Court: As to what minutes, well, you can do that, of course, it's now in evidence and you have a right then to——

Mr. Dunn: I merely wanted to call a certain part of it to your attention.

(Testimony of Stuart E. Tope.)

The Court: Very well.

Mr. Dunn: There is a meeting, your Honor, of the stockholders on November 17, 1952.

The Court: That is shortly after the inception of the corporation.

Mr. Dunn: That is true. The next minutes of the stockholders is April 1, 1953. The next minutes of the stockholders is April 1, 1954, and there are no subsequent ones.

The Court: Of course, if it is a question of the stockholders not holding meetings conformable to the by-laws, or the law itself for the State, then, by quo warranto, it can put the corporation out of business.

Mr. Dunn: I know that, sir.

The Court: It is not for me to put it out of business, that is for the State.

Mr. Dunn: I don't want you to put it out of business.

The Court: That issue is not before me, [263] but your point is that it was not a legitimately acting corporation.

Mr. Dunn: That is true, sir.

The Court: Well——

Mr. Dunn: That in fact, it was an individual acting.

The Court: Yes. The only authority for putting it out of business would be the State, or by the Territory, by quo warranto. I take it, it is incorporated under the laws of the Territory and not under the laws of the national government?

(Testimony of Stuart E. Tope.)

Mr. Dunn: That's true.

Q. (By Mr. Dunn): Mr. Tope, did you ever do any right of way clearing before this job?

A. I did some clearing for Mr. Munter.

Q. Did you ever do any right of way clearing before this job? A. No.

Q. Did you have any experience in those—in operating cats in these extremely cold temperatures prior to this job? A. No.

Q. Mr. Nesbett, could we stipulate again, in the hope of saving time, that the deposition of [264] Mr. Tope in its entirety with attached exhibits be submitted into evidence?

The Court: I believe, Mr. Dunn, you would have the right to offer it in evidence, the deposition, if you conceive the notion that it is not in harmony with his testimony. That is the right that you would have to offer any contradictory testimony that you have.

Mr. Dunn: Well, I believe——

The Court: If you identify the deposition, I think it is also wise to call attention to what you think is an inconsistency. The practice is, at least, it has been the practice to just simply offer the deposition and then point out later on the inconsistencies.

Mr. Dunn: Yes.

The Court: I think a better practice would be to call his attention to what you think is an inconsistency in his testimony here and in the deposition.

Mr. Dunn: I intend to do that, your Honor. May

(Testimony of Stuart E. Tope.)

I have the deposition, please, it is in the file someplace. (The Clerk is looking for the deposition of Mr. Tope.) I will pass that for the moment, your Honor. [265]

Q. (By Mr. Dunn): Who is secretary-treasurer of Stuart Construction Company now?

A. Bertha Tope.

Q. Who was during the time that you were doing this clearing? A. Bertha Tope.

Q. Did you assign this contract of November—correction, did you assign this contract of December 17, 1953, now Plaintiff's Exhibit 1, to the N. C. Company?

A. I assigned all monies of the contract with the N. C. Company at Fairbanks.

Q. Now, was that in keeping with your pattern of previous assignments that you testified to yesterday? A. Yes.

Q. To pay them for these lease rental agreements?

A. It wasn't all to be paid to the lease-rental agreement deal, I don't believe.

Q. But it was to pay N. C. Company for monies owed? A. Yes.

Q. And that was the reason that you did that to see that the N. C. Company got its money?

A. Yes.

Q. I hand you this instrument and ask you if you can [266] identify the same? Can you identify it? A. Yes.

Q. What is it? A. It is an assignment.

(Testimony of Stuart E. Tope.)

Q. What assignment?

A. It's an assignment—shall I read it?

Q. No. It is an assignment from whom to whom?

A. It's an assignment from the Stuart E. Tope to Northern Commercial Company.

Q. From Stuart E. Tope?

A. Stuart Construction Company; just a minute and I'll check it.

The Court: What is the name of that company in Fairbanks?

Q. Northern Commercial Company, your Honor. We speak of it as the N. C. Company; that is habit, sir.

A. Stuart Construction Company.

Q. Is that who executed the assignment?

A. That is who signed it; I signed as president.

Q. And it runs to the Northern Commercial Company?

A. It is to be run to the Northern Commercial Company in Fairbanks.

Q. Is this the one that covered the contract of December 17, now Plaintiff's Exhibit 1?

A. Yes. [267]

Q. I would like to offer it in evidence, please.

The Clerk: Defendant's Exhibit D.

The Court: May I inquire, Mr. Dunn, is that the assignment of the benefits that might accrue to the plaintiff under the contract of December 17?

Q. I believe the way it reads, your Honor, is the assignment of all monies earned with respect to pipeline clearing, yes.

The Court: That is what I supposed.

(Testimony of Stuart E. Tope.)

Mr. Nesbett: May I ask the witness a question or two about this?

The Court: Yes.

Q. (By Mr. Nesbett): The date of this assignment is December 2, of 1953; is that the date, or approximately the date you signed it?

A. Yes, if it's on there that is the date it was signed.

Mr. Nesbett: I have no objection, your Honor.

The Court: Does this refer to the prospective contract to be entered into?

Mr. Dunn: I will read it—it doesn't refer to the contract. [268]

The Court: It doesn't?

Mr. Dunn: No, it merely says, "All sums of money now due or to become due us from Oaks Construction Company for any and all accounts, including but not limited to earnings, to become due under pipeline clearing contract and/or snow clearing."

The Court: Yes, it was in the prospect.

Mr. Dunn: Yes. I would like to offer the deposition of Mr. Tope with attached exhibits into evidence.

Mr. Nesbett: I would like to ask for what purpose, your Honor? I have no particular objection.

The Court: It could only be for one purpose, for contradiction, impeachment purposes. Now, the courts have held, and I think we ought to be liberal about it, but the courts have held that a previous deposition is not competent for the whole of it, not

(Testimony of Stuart E. Tope.)

to be competent, to show the witness the deposition and show him that part concerning which you think there was an inconsistency and then offer that part. Now, it is the practice, I observed it over and over again where the entire deposition be offered, but, of course, if there is no contradiction then to clear up the record now, if you are of the mind that it does impeach the witness on all the points covered. I imagine that deposition only [269] appertains to this one thing, this one contract. So that it will not severely subject matters there, why then you have a right to offer it. Counsel asked for what purpose and, as I said, I think I am correct when I say it can only be offered for impeachment purposes.

Mr. Dunn: Your Honor, I don't contend that everything in this deposition is contradictory to what the witness has testified to and I am more than willing to call attention——

The Court: I think that would be the better practice to do that, then counsel would be advised and the witness would have an opportunity to explain—may be able to do that.

Mr. Dunn: I offer it now, please.

The Court: Is it Exhibit E?

The Clerk: This is E.

The Court: Yes, I think, Mr. Dunn, that is the better practice to call his attention to what you think is an inconsistency between his testimony now and given in the deposition.

Mr. Dunn: Thank you, sir.

(Testimony of Stuart E. Tope.)

Q. (By Mr. Dunn): Mr. Tope, I now hand you Defendant's Exhibit E——

The Clerk: It should be D—no, that's right.

Mr. Dunn: E as in Easter?

The Court: I take it there is no question but that is his deposition and he signed it and remembers it and everything?

Mr. Dunn: Is there any question in your mind Mr.—well, your Honor, it came from the Clerk's files, we know that.

The Court: That may be true, but you have a right to assume that it's his deposition, but I believe the root rule is to ask him if that is his deposition.

Q. (By Mr. Dunn): Is that your deposition, Mr. Tope, taken on February 13, 1957, and the following day too, as a matter of fact?

A. I have signed this.

Q. Correction, I will restate my question. Is this your deposition given in Anchorage, Alaska on February 13, 1957, and also on February 18, 1957?

A. It so states here and I signed it.

Q. It is or isn't? A. I guess it is, yes.

Q. Now, I'll call your attention, Mr. Tope, to Defendant's Exhibit 1, attached to that deposition, and particularly, to the large page entitled, [271] "Financial and Operating Statement," did you cause that Financial and Operating Statement to be prepared? A. Yes, I did.

Q. Who prepared it? Who did you have prepare it? A. An accounting firm in Fairbanks.

(Testimony of Stuart E. Tope.)

Q. What was the name of the accounting firm?

A. Marlor Accounting Service.

Q. Was that prepared from records that you gave them? A. Yes.

Q. Is it accurate to the best of your knowledge?

A. To the best of my knowledge, yes, it is accurate.

Q. You may fold that up, Mr. Tope, if you will, and I invite your attention—maybe I better help you with that, that is sort of tricky. I invite your attention to page 22 of that deposition. Now, I am going to read questions and if I misread one, I want you to immediately correct me. And I want you to read the answers. Speaking of the contract of December 17, 1953, Plaintiff's Exhibit 1, at the top of the page. "Did the Stuart Construction Company begin work under that contract?"

A. "Yes."

Q. "Did the Stuart Construction Company fully perform that contract? [272]"

A. "It did not."

Q. "To what extent did Stuart Construction Company perform that contract?"

A. "In actual mileage?"

Q. "In percentage?"

Mr. Nesbett: Your Honor, I don't know what is going on; I didn't buy a copy of that first half of Mr. Tope's deposition and I think this is an improper way to get the deposition before the Court, and anyway—in any event, and I suggest—

(Testimony of Stuart E. Tope.)

The Court: Well, the rule is to ask the witness about a statement about the facts in the case and then confront him with the deposition and you answer the question concerning the same subject matter as follows: Did you answer the same subject matter in the deposition?

Mr. Dunn: All right, sir, if you wish.

The Court: It isn't the way I wish, it's what I concede to be the law, getting in evidence; counsel has made objection and, of course, we could go on and have you read questions and he would answer as he did in the deposition, but somewhere along the line he must be confronted with a statement made there that is in variance with his [273] testimony here, in order to make the deposition competent.

Q. (By Mr. Dunn): Following your reading on page 22, I invite your attention to line 11, and did you testify, "I couldn't tell you the percentage, I was doing it on mileage." Did you so testify? Now, I want a yes or no answer, Mr. Tope; look at line 11 on page 22 of your deposition, did you so testify? I don't think the witness knows what he is supposed to do, your Honor.

The Court: Well, the question, the proper question is: Did he make the answer there to that question? Read the question and then ask him if that is the answer in his deposition. The witness doesn't understand.

Q. I'll read to you a part of your deposition beginning on line 7. "Question: To what extent did

(Testimony of Stuart E. Tope.)

Stuart Construction Company perform that contract? Answer: In actual mileage? Question: In percentage? Answer: I couldn't give you percentage, I was doing it on mileage." Did you so testify?

A. I just don't know.

Q. What does it say in your deposition? [274]

A. Which line?

Q. The line I read?

A. Well, you read 22 and—or line 7, is that the one you are referring to?

Q. I am referring to lines——

The Court: Line 7, page 22, as I remember it.

Q. Seven to eleven inclusive.

A. Seven to eleven?

Q. Inclusive.

A. I can't recall just how I testified.

Q. Did I read line 7 to 11 inclusive, correctly?

A. Yes.

Q. What mileage were you referring to, Mr. Tope, when you gave that answer set forth on line 11?

A. I just don't recall how I testified; I just don't know.

Q. You can't remember?

A. I can't remember.

Q. Does the deposition aid you in refreshing your memory at all?

A. I just told you, I just don't remember.

Q. And the deposition is of no aid in refreshing your memory, as to how you testified, is that correct? [275]

(Testimony of Stuart E. Tope.)

A. That is correct, I just can't remember.

Q. I hand you this instrument and ask you if that is your handwriting? Mr. Tope, can't you tell by looking at it, do you have to study it?

A. Yes, I do; that is my signature, but this is not my handwriting.

Q. You recognize your signature, then?

A. I recognize my signature, yes.

Q. Will you read that, please?

A. "For the work period ending it is requested that the Stuart Construction Company be paid the said amount to date total of eleven and two-tenths miles of clearing at one hundred per cent completion and two miles at fifty per cent completion, which is equivalent to 64,416 lineal feet at one hundred per cent completion."

Q. And that is signed by you, is it not, Mr. Tope?

A. That is signed, "Stuart Construction Company, Stuart E. Tope, by Stuart E. Tope and approved by Roy S. Crawford."

Q. What is the date of it?

A. And the date is the 6th of February, 1954.

Q. And——

A. I believe that that is Mr. Crawford's handwriting. [276]

Q. It's your signature though, isn't it?

A. It is my signature.

Q. Mr. Tope, I call your attention to line 12, page 22, of your deposition, which you have in front of you.

A. Yes.

(Testimony of Stuart E. Tope.)

Q. "How many miles does the contract call for?"

A. "One hundred, I believe, or thereabouts, it could vary one way or the other."

Q. "I ask you if that instrument I just handed you dated December 17, 1953, would help you to refresh your memory as to the mileage called for?"

A. "I don't think it was in mileage, I think it was in feet."

Q. Did you so testify at the time your deposition was taken? I would like to offer this, your Honor.

The Court: Very well.

Mr. Nesbett: No objection.

A. If I testified that it wasn't feet—it would have to be in feet.

Q. Now, just a moment, I don't want any more of these stories, I bore with you yesterday.

The Court: The question is: Did he so testify in his deposition? [277]

Q. That's right. Did you so testify in your deposition?

A. I say right here, I don't think it was in mileage, I think it was in feet.

Q. Did you so testify in your deposition? Just answer the question, Mr. Tope.

A. I guess I did, if it says here.

Q. Well, did you or didn't you? I don't want guesses.

The Court: I construe that as saying he did.

Q. Is that what you are saying?

(Testimony of Stuart E. Tope.)

A. I said if it says here in the deposition, I say yes, it did.

Q. Did I read lines——

A. 18, it says right on line 18 that I did.

Q. ——lines 12 to 18, correctly?

A. Yes; I believe you did.

Q. Did you receive the demands from Oaks Construction Company periodically after you began working, on the posting of a bond? A. Yes.

Q. Was that throughout the time you were on the job, pretty much so?

A. Well, the first couple of months, yes. [278]

Q. That would be the months of January and February?

A. That would be the months of December and January; I think I was requested in February, too.

Q. How about March?

A. I just can't tell you whether I did or not.

Q. How about April?

A. That I can't tell you either.

Q. Did you make any effort to get a bond after your negotiation with Bill Olday?

A. I don't believe so.

Q. This equipment that you purchased from the Northern Commercial Company, as evidenced by the lease purchase contract, Plaintiff's Exhibit 4, was that new or used?

A. They were used.

Q. Mr. Tope, I hand you six yellow pieces of paper and ask you if you can tell me what they are?

(Testimony of Stuart E. Tope.)

A. They're bank statements for the Stuart Construction Company.

Q. For what months, please?

A. Well—maybe——

Q. Or maybe I can help you by asking you a leading question. Are those the bank statements for Stuart Construction Company for the months of December, 1953, to and including May of [279] 1954?

A. That's for the months of December——

Q. Of 1953 to and including May of 1954?

A. Up until May, 1954.

The Court: Up to May?

A. Including May.

Q. Now, enclosed in each of those yellow sheets of paper, is there a number of checks?

A. Yes.

Q. Are those the checks evidenced on the statements themselves? Are those the checks evidenced on the statements themselves? Your Honor, I wonder if we could save time by asking that these statements be marked with a notation as to the number of enclosures in each, and having been so marked, call a recess, during which time the witness may examine them?

The Court: Very well.

Mr. Nesbett: I will object to the recess, unless you were going to call one anyway, and we will examine it from 1 to 2 and come back and tell the Court.

(Testimony of Stuart E. Tope.)

The Court: I understand that the Court Reporter needs a recess after one hour, and I will call a recess at this time, however, it ought to be short, so you can quickly go over [280] whether these are statements, whether these are checks and whether debits or credits with the bank, or whether it is, that is the current credit, each check was a debit or credit with the bank, and it ought to be a simple matter to know whether or not they were a statement for the corporation covering that period.

Mr. Dunn: I think so, sir, but I think he apparently wanted to look at them for awhile.

The Court: Where did you get them, from the defendant?

Mr. Dunn: Got them from the Plaintiff's box.

Mr. Nesbett: But it is obvious this witness is extremely careful.

The Court: Would you examine them and see, Mr. Nesbett?

Mr. Nesbett: I will look at them.

The Court: Whether they are the debits against his credits—when I say “he,” I mean the corporation.

Mr. Dunn: I will still repeat my request that these be marked for identification.

The Court: Yes; you have a right to do [281] that.

Mr. Dunn: And that the markings show the number of enclosures in each statement?

(Testimony of Stuart E. Tope.)

The Court: Yes. All under one cover, are they?

Mr. Dunn: No, sir; there are six.

The Court: Well, I mean are you having them as one exhibit?

Mr. Dunn: I would prefer to have them as six to refer to them; it makes it much easier.

The Court: Suppose you say——

The Clerk: G.

The Court: And then say one to 6.

Mr. Dunn: May I request that those be marked as for identification, Defendant's Exhibit G and then 1, 2, and so on, chronologically beginning with the December of 1953. Now, I will continue while she is marking those, if I may, your Honor?

The Court: Very well.

Q. (By Mr. Dunn): Plaintiff's Exhibits 5 and 6, Mr. Tope, I hand you and ask you whether or not you ever answered those letters?

A. I did not.

Q. Did Stuart Construction Company? [282]

A. No; not that I recall.

Q. I invite your attention, Mr. Tope, to page 27 of your deposition, specifically, to line 7: "Question: Mr. Tope, when did Stuart Construction Company begin work under this contract of December 17, 1953? Answer: It was either the second or third of January, 1954. Question: When did it stop work? Answer: I believe it was April 25, 1954, or thereabouts."

Did you so testify at the time your deposition was taken? A. Yes.

(Testimony of Stuart E. Tope.)

Q. Now, you have testified, haven't you, that you attempted to set up a meeting with Williams-McLaughlin & Marwell?

A. And the Oaks Construction Company, too.

Q. Yes, but the meeting at which Williams-McLaughlin & Marwell was to be represented?

A. Yes.

Q. Now, that was the prime contractor on this job, was it not? A. Yes.

The Court: Who?

Q. That was the prime contractor on this job, was it not; was my question, sir. [283]

The Court: Marwell, was that the name?

Q. Williams-McLaughlin & Marwell, your Honor.

The Court: Yes.

A. That is correct.

Q. Well, why did you feel in the light of your contentions as being an employee of Oaks Construction Company that you had a right to meet with the prime contractor?

A. On account of the assignment.

Q. What assignment?

A. That I had given to the N. C. Company in Fairbanks.

Q. You thought that assignment would justify your meeting with the prime contractor?

A. That's right.

Q. Have you not testified, at the time you went to work on this clearing job you didn't have any

(Testimony of Stuart E. Tope.)

money at all? A. I did not.

Q. You did not so testify?

A. I testified that I did not have any money, that's right.

Q. You did so testify then?

A. Yes. [284]

Q. Well, do you have any explanation to offer, Mr. Tope, as to why it was—well, I'll retract that. Did you make your condition known to Oaks Construction Company, your financial condition?

A. I certainly did.

Q. And did you ask him to put you on a salary so you could have some money?

A. I told him I was going to have to have some money and they suggested putting me on the payroll.

Q. And you agreed? A. Yes.

Q. Well, do you have any explanation to offer as to why Oaks Construction Company knowing that you were without funds would waive a bond as you contended it did?

Mr. Nesbett: Now, your Honor, I'll object to that question. It assumes facts that are not based on any testimony of the witness and to the fact that he does claim they waived a bond.

The Court: I never heard it, at least, I don't recall any such testimony, but if my recollection is bad you can——

Q. Well, I will reword the question. Do you have any explanation to offer as to why, [285]

(Testimony of Stuart E. Tope.)

knowing your financial condition, Oaks Construction Company would permit you to start work on that pipeline and continue to work without trying to get a bond from you?

A. Well, Mr. Oaks said that we could do it on an hourly basis if I couldn't get a bond.

Q. Can you imagine why he would permit you to do that, knowing you were broke?

A. Well, knowing that I had been going along on an hourly basis.

Q. Mr. Tope, I invite your attention to page 56 of your deposition, specifically to line 5: "Question: Did you ask to be put on the payroll as a foreman? Answer: I was told I had been put on. Question: That doesn't answer my question; did you ask to be put on? Answer: No." Did you so testify when your deposition was taken?

A. Yes.

Q. I call your attention to page 33 of your deposition, specifically to line 10—well, first let me ask you this question: Does that answer beginning at the top of page 33 deal with a conversation that you had with Mr. Noonan?

A. Pardon? [286]

Q. Does the answer beginning at the top of page 33 deal with a conversation that you had with Mr. Noonan? A. Yes.

Q. Mr. Noonan was one of the partners in Oaks Construction Company, was he not?

A. He was.

(Testimony of Stuart E. Tope.)

Q. Now, did Mr. Noonan refute or deny your claimed employment on an hourly basis?

A. Not that I can recall.

Q. I now invite your attention to line 10 of that same page. A. Yes.

Q. "And then I told him about Oaks offering me this on an hourly basis and he said Oaks didn't have anything to do with this, he was managing the pipeline." Did you so testify at the time your deposition was taken?

A. It states right here, "yes."

Q. Did you testify on direct examination that you did not know the terms of the settlement that Oaks Construction Company made with the Northern Commercial Company in connection with your account with the Northern Commercial Company in Fairbanks? [287] A. That is correct.

Q. Didn't know the terms of the settlement?

A. No, sir.

Q. Still don't? A. I do now, yes.

Q. Oh, you do now? A. Yes.

Q. Now, calling your attention to Exhibit 2, Plaintiff's, that purports, does it not, to make allowance for the expense of running these cats, or at least that is what you contend, is it not?

A. Yes.

Q. Well, now, how about these various trucks, Dodge 2½-ton, Ford Station Wagon, and GMC pickup? That is all of them, isn't it?

A. Yes.

(Testimony of Stuart E. Tope.)

Q. Wasn't there any expense in connection with running those?

A. There was gasoline, yes, and oil.

Q. Maintenance? A. Yes.

Q. Did you make any allowance for that?

A. It doesn't show here.

Q. There is none, is there?

A. Pardon? [288]

Q. There is none, is there? A. No.

Q. Now, with respect to the cats themselves, you made allowances, did you not, according to your Exhibit 2? A. Yes.

Q. For lubricating maintenance?

A. Yes.

Q. Did you make any allowance for maintenance other than lubrication?

A. Well, what do you classify as lubrication, is that—does that take in the greases and oil and Prestone and the fuel?

Q. Well, I am afraid I will have to turn your question right back on you. You have a column in your Plaintiff's Exhibit 2, do you not, entitled, "Lubricating, Maintenance"? A. Yes.

Q. Now, what did you include in Lubricating Maintenance?

A. Well, it would be the lubricants and the maintenance of it; it would be to maintain it.

Q. Well, is that complete cat maintenance?

A. It would be complete cat maintenance as far as the lubricant of it is concerned, yes. [289]

Q. Well, don't cats need maintenance beside

(Testimony of Stuart E. Tope.)

that lubrication? A. Yes.

Q. Did you make any allowance for that additional maintenance?

A. No, I didn't; I did that myself.

The Court: Mr. Dunn, are you at a point where we might take a recess?

Mr. Dunn: Yes, your Honor.

The Court: Court stands in recess for a period of ten minutes.

(At 11:05 a.m. a ten-minute recess was had.)

Mr. Dunn: May I have Defendant's Exhibit G for Identification?

The Court: Those are the bank checks?

Mr. Dunn: Yes, sir.

Q. (By Mr. Dunn): I hand you Defendant's Exhibits G 1 to G 6, inclusive, and ask you if the checks which comprise part of that exhibit are checks drawn on the account of Stuart Construction Company, Inc.?

A. These are checks drawn on the account of Stuart Construction Company. [290]

Q. And were those checks paid on that account, the ones you have there?

A. Paid on the account?

Q. Yes; were they paid, the ones that you have there?

A. Well, there is some there and I think there is a few NSF's there. I don't know, I believe there are.

Q. Are there a bunch of canceled checks there?

(Testimony of Stuart E. Tope.)

A. Yes; there are.

Q. In an attempt to save time, Mr. Tope, I will tell you that if you will thumb through those checks in Defendant's Exhibit G, you will see a number made out to cash, a number to various bars, and things like that. I believe there is even one to a curio shop. And I ask you if you can explain how it is that those—that checks of that nature would appear in the banking account of a corporation engaged in the construction business?

A. Well, they were cashed for expenses. Along the highway that—they have always had a bar-cafe along here, like Alpine and when you would be going out that way there would be one you would cash there, Alpine, bar-cafe, and you would cash one there, or you would cash one if you [291] needed some money you would cash one; out at the Bear Club Bar and Cafe, or Big Timber or Gateway, or any of those places all have bar-cafes.

Q. You would cash a check whenever you needed money? A. That is right.

Q. Now, are any of those checks signed by any person other than yourself? A. No.

Q. I will call your attention to this check numbered 1082 and ask you if it isn't true that that is made out to LaBrie's? A. Yes; it is.

Q. Where was LaBrie's?

A. It was down here on Fourth Avenue.

Q. And what was it?

A. It was a merchants lunch place.

Q. Lunch only?

(Testimony of Stuart E. Tope.)

A. Oh, no; they had a bar there, too.

Q. They served dinner?

A. They served lunches, yes, uh-huh.

Q. This check number 1083, to whom is it made out? A. I——

Q. Let's see if the endorsement will help us on the back? [292]

A. Yes; Pauline Johnson.

Q. Well, is Pauline Johnson named as the payee on that check?

A. No; it's Rainbow something, I can't distinguish this——

Q. Does the endorsement help you on that?

A. Yes; Rainbow Room.

Q. What is the Rainbow Room or what was it?

A. Well, it was a cafe out—it's a cafe out along the highway out of Fairbanks.

Q. Out of Fairbanks? A. Yes.

Q. I ask you whether or not Check Number 1087 is made out to Stuart E. Tope and in the amount of twenty dollars? A. Yes.

Q. And there are a number merely made out to cash, are there not? A. Yes.

Q. Where is the Silver Fox Lodge?

A. Out of Fairbanks fifty miles.

Q. Which way? A. South.

Q. Where is Tazlina Lodge?

A. Mile 156 out of Anchorage here. [293]

Q. How far would that be from Big Delta?

A. From Big Delta? Well, at that time you had

(Testimony of Stuart E. Tope.)

to go by Tok Cut-off to get to Big Delta, and it is a much longer route——

Q. Well, as the crow flies, how far is it from Big Delta, roughly? A. I can't tell you.

Q. Roughly? Is it over fifty miles?

A. It is over fifty miles, yes.

Q. How far is it from Tok Junction?

A. Big Delta?

Q. No, Tazlina Lodge. Is it over fifty miles?

A. One hundred and twenty-eight miles from Timber to Tok and it's about fifty miles from Tazlina Lodge to Big Timber, so that would make it about one hundred and seventy-eight miles, I imagine.

Q. Where is Alpine Inn?

A. Mile 61 from here, going north.

Q. Is Check Number 1098—that is made out to Bertha Tope and in the amount of one hundred dollars? A. Yes; it is.

Q. Does it show what it is for at all?

A. No; it doesn't. [294]

Q. I hand you Check 1109 and ask you to whom that was made out? A. It's not made out.

Q. It's left the payee as blank?

A. That is right.

Q. Who endorsed that one?

A. Well, I particularly guess I don't know how you pronounce the name.

Q. Spell it, please.

A. W-o-i-t-e-k J-o-e, Joe Woitek.

Q. Do you know what his business was?

(Testimony of Stuart E. Tope.)

A. No; I don't.

Q. Can you tell from looking at the check?

A. Well——

Q. That is a stamp endorsement, is it not?

A. That is the Pioneer Club.

Q. Where is that?

A. I believe that is right here in Anchorage.

Q. How far is it from this very room, courtroom? A. Well, it is almost a block.

Q. Almost a block? A. Uh-huh.

Q. Is check number 1110 made out to Wells Photo? A. Yes.

Q. Is that endorsed by Ward Wells, Ward W. Wells? [295] A. It's his stamp.

Q. Stamp endorsement? A. Yes.

Q. What is the date on it?

A. February 23.

Q. What picture was the corporation having taken, do you know?

A. What picture was the corporation——

Q. Did the corporation order that occasioned payment?

A. Well, I don't think the corporation ordered any pictures for that.

Q. Did it order photographic supplies?

A. Yes; there were some photographic supplies.

Q. What was that?

A. I believe that was for film.

Q. For what?

A. For a 16 MM camera.

(Testimony of Stuart E. Tope.)

Q. I hand you check number 1111 and ask you who the payee is on that check?

A. Mecca Bar.

Q. Where is that? A. Fairbanks.

Q. What was that one hundred dollar check for Berha Tope for, do you know; the one I [296] showed you awhile ago?

A. Probably for expenses.

Q. What kind of expenses?

A. General expenses.

Q. How about check number 1064; that is made out to Bertha Tope, too, is it not?

A. Fifteen dollars, yes, fifteen dollars.

Q. Do you have any idea what that was for?

A. I wouldn't have any idea.

Q. General expenses? A. I imagine.

Q. Gene Flowers ever work for you?

A. Gene Flowers ever work for me?

Q. Yes.

A. I hired him to fly me to Tok; yes.

Q. To fly you to Tok? A. Yes.

Q. What is the Town Club?

A. The Town Club?

Q. Yes. A. I don't recall it.

Q. I hand you Check No. 1134 and ask you to name the payee on that check, please?

A. Clarks Curio Shop in Fairbanks.

Q. Generally, I ask you if there are not a number [297] of these made out to various bars?

A. They're all bars and cafes, just like the Mecca Bar, it had a cafe down stairs and I would

(Testimony of Stuart E. Tope.)

cash a check there and go down and eat, yes, various times.

Q. Check No. 1124, to whom is that made out?

A. Coop Drug in Fairbanks.

Q. Do you have any idea what that would be for?

A. It is all the stuff, it would be just general expense money.

Q. All of these that refer to lodges and bars and curio shops and drug stores would be general expense money? A. That's right.

Q. Well, that's the same thing you said before, isn't it, Mr. Tope, that you just wrote a check whenever you needed money?

A. That's right.

Q. What money went into that corporate account, Mr. Tope?

A. Just monies that I received from the Oaks Construction Company.

Q. Did you put your own salary in there?

A. That's right.

Q. I hand you this black book and ask you what [298] it is?

A. It's a general ledger of the Stuart Construction Company.

Q. I call your attention to the pages that I have marked with paper clips in there and I ask you whether or not those pages bear reference to monies connected with the contract of December 7, 1953, Plaintiff's Exhibit 1?

(Testimony of Stuart E. Tope.)

A. I would have no way of telling you; I'm not a bookkeeper.

Q. Just look at the pieces of paper, Mr. Tope, and tell me whether or not they refer to monies connected with Oaks Construction Company in this particular contract?

A. I would have to have Mr. Marlor down here to prove that; I just can't tell you; I don't know.

The Court: Can't you inspect it and tell whether or not it is a ledger?

Q. Yes, but I can't testify, that is the trouble.

The Court: Well, you can offer it in evidence and then we can all interpret it; there is no use calling another witness, unless there are accounts there that are dubious.

Q. Well, that general ledger that I just handed you, Mr. Tope, which is now Defendant's H, is it not? [299]

The Clerk: Yes.

Q. Was that prepared by Marlor, too?

A. Yes.

Q. At the same time he prepared that financial statement that I called your attention to awhile ago, which is attached to your deposition?

A. Yes.

Q. I invite your attention, Mr. Tope, again, to your deposition, specifically to page 52, line 7.

A. Yes.

Q. And ask you whether or not in answer to the question: "So you got along all right with Crawford," and you answered, "Yes," at the time of

(Testimony of Stuart E. Tope.)

your deposition, at the time your deposition was taken?

A. As far as the job was concerned, yes.

Q. I asked you whether or not you answered “yes” at the time of your deposition, at the time your deposition was taken? A. Yes.

Q. And with respect to Warren Hager, I invite your attention to line 16 on the same page and ask you whether or not at the time your deposition was taken in answer to the question—well, correction, specifically to line 15, and I ask you whether or not with respect to the question: “How did you [300] get along with him,” you answered, “Well, we had a few words”?

A. I answered just a few, yes. Would you repeat the question?

Q. Yes; I will. Your attention, I call your attention to lines 15 and 16 on page 52 of your deposition and ask you whether or not at the time that your deposition was taken, in answer to the question: “How did you get along with him,” meaning Hager, you answered: “Well, we had a few words”?

A. That’s right.

Q. And now directing your attention to line 17 on the same page, at the same time, I asked you whether or not in answer to the question, “Just a few,” you answered, “Well, I would say a few, yes”?

A. On the job, yes.

Q. At the time your deposition was taken, did you answer the question: “Just a few,” by saying, “Well, I’d say a few, yes”?

(Testimony of Stuart E. Tope.)

A. Yes, on the job, yes.

Q. Just answer the question, yes or no, Mr. Tope, did you so testify when your deposition was taken?

A. Yes, on the job, yes.

Q. Will you please answer the question. When your [301] deposition was taken, did you answer the question: "Just a few," appearing at line 17 on page 52, with the words, "Well, I'd say a few, yes"?

A. I so stated here, yes.

Q. And I ask you if at the same time in answer to the question which appears on line 19, "Generally speaking, did you get along all right with him?" and you answered: "As far as I know, yes." Did you so testify?

A. That's right.

Q. And speaking of Vincent Abbott, I invite your attention to page 53 of that same deposition, line 5, and ask you whether or not in answer to the question: "How did you get along with him?" meaning Abbott, you answered, "I never had any words with him." Did you so answer?

A. That's right.

Q. And at the same time did you answer the question: "Got along all right with him?" with the answer "yes."

A. That's right.

Q. Now, I'll call your attention to line 54—beg your pardon, page 54, line 23 of your deposition and ask you whether or not at the time that deposition was taken, in answer to the question: [302] "Well, do you consider it of importance how much you cleared since you were working on an hourly

(Testimony of Stuart E. Tope.)

basis?" and you answered: "No, it wasn't important." Did you so answer?

A. Would you repeat that again; read that again to me, please; what line are you referring to?

Q. I am sorry if I didn't call your attention to the line, it is on page 54, line 23. At the time your deposition was taken, in answer to the question: "Well, do you consider it of importance how much you cleared since you were working on an hourly basis?" you answered, "No, it wasn't important"?

A. That's right.

Q. Now, your equipment you contend, Mr. Tope, was or, at least, your cats were rented on an hourly basis, is that right? A. That's right.

Q. Now, you were paid personally too, isn't that right? A. That's right.

Q. Were you paid on a flat salary or so much an hour? A. On my wages?

Q. Yes.

A. I was paid a flat two hundred and fifty dollars [303] a week.

Q. Just a flat salary. Well, you never had to turn in any time cards or anything like that?

A. I just don't know; I can't tell you that.

Q. Well, if you were on a flat salary, why would you turn in time cards?

A. I think it was requested, if I am not mistaken; I don't know actually; I just don't know.

Q. How long were you on that job? Well, we know you were on there for several months, weren't you? A. Yes.

(Testimony of Stuart E. Tope.)

Q. You tell me you don't remember whether or not you turned in time cards during that extended period?

A. I can't recall.

Q. Can't remember?

A. I just don't know.

Q. Well, with your—is your memory any worse now than it was when your deposition was taken?

A. Four and one-half years is a long time.

Q. I agree with that.

Please answer my question.

A. Repeat your question, please.

Q. Is your memory—is—was your memory any better at [304] the time your deposition was taken than it is now?

A. I imagine it would be about the same.

Q. About the same. I call your attention, Mr. Tope, to page 55 of your deposition, line 1, and ask you whether or not at the time that deposition was taken, in answer to the question: "Did you turn in time cards for the hours worked?" you answered: "For my hours"?

The Court: For what?

Q. "For my hours." Do you so answer?

Mr. Nesbett: That isn't read correctly, your Honor. I submit if it is a question it should be read as a question. Actually the witness asked him a question back.

Q. That's true, he answered my question with a question.

The Court: Yes.

Q. Did you so testify, Mr. Tope?

(Testimony of Stuart E. Tope.)

A. On page 54?

Q. 55, line 1.

A. I asked for my hours, yes.

Q. And did you then proceed to answer the question, calling your attention to line 3 on the same page; well, we will take that first question: "For your personal hours?" and did you answer [305] that question, "Yes, I turned them into Mr. Hager"? Did you so testify?

A. I so testified here, yes.

Q. Well, now does that help to refresh your memory? A. Yes, a little bit, yes.

Q. Well, did you turn your hours in then?

A. I am pretty positive I did; if I said I did, I did.

Q. And by "pretty positive" as I recall, you mean positive?

A. I said, if I said I did, I did; if it says there I did, I'm positive I did.

Q. How many hours did you turn in to Mr. Hager? A. I just can't tell you.

Q. Did you claim any overtime?

A. I just can't tell you; I just don't know.

Q. Well, you know you worked for a flat salary don't you?

A. I know, but he wanted time cards for some reason; I just don't remember what it was.

Q. You are sure of that now?

A. Just as I said, I just don't know positively; I can't swear on the stand because—that I know, because I don't.

(Testimony of Stuart E. Tope.)

Q. You mean you don't know whether he wanted time cards or not? [306]

A. I just can't tell you anything about it.

Q. I call your attention to page 60, line 18, of your deposition and ask you whether or not at the time that deposition was taken, in answer to the question: "Now, after you moved your cats to the job site, did you attempt to obtain a bond, performance bond, to satisfy Mr. Oaks?" you replied, "Yes, I did"? Did you so testify then?

A. Yes.

Q. Now, that was, according to your contention, was it not, after this hourly rate had been agreed upon? A. Yes.

Q. Then why did you try to get a bond if you were on an hourly rate and a salary, will you please tell me?

A. Because Mr. Oaks told me to try, to keep trying to get one.

Q. Just because he told you to?

A. That's right.

Q. Do you know what a bond is, do you, Mr. Tope? A. Yes, I think I do.

Q. Now, I will call your attention to page 71 of your deposition, specifically to line 2, question: "Mr. Tope, you testified on cross-examination, did [307] you not, or did you, that you never got an advance from Oaks Construction Company as a result of any percentage of the amount of work completed as compared to the total amount called for?" and I

(Testimony of Stuart E. Tope.)

now ask you if in answer to that question you testified, "I did not"? Did you so testify?

A. Yes.

Q. And did you then continue to answer the question—calling your attention to line 7, you did not so testify by saying that "I did receive." Did you so testify? A. Here, yes.

Q. And calling your attention to line 9, did you not then proceed to answer the question: "Did you ever get any such advances——"

Mr. Nesbett: That wasn't an answer to a question, that was the question.

Mr. Dunn: I have to admit that it so appears in the deposition, but I think it is obviously a typographical error, don't you, Buell?

Mr. Nesbett: I don't know; I was there when it was taken, but I prefer to go with the deposition, but it is worded as a question from you: "Did you ever get any such advances?" and Tope answered, "No, I didn't get any advances." [308]

Mr. Dunn: I thought you were talking about the one proceeding that?

Mr. Nesbett: Maybe we can start over and save time?

Mr. Dunn: Yes.

Q. (By Mr. Dunn): Did you then proceed—calling your attention to line 9, to answer the question: "Did you ever get any such advances?" with the words, "No, I didn't get any advances"? Did you so testify? A. Yes.

Q. And did you then proceed—calling your at-

(Testimony of Stuart E. Tope.)

tention to line 11, to answer the question: "Did you ever request one?" by replying, "Not that I recall"? Did you so testify? A. Yes.

Q. Is that still your testimony? A. Yes.

Q. Did the Stuart Construction Company request any? A. Pardon?

Q. Did the Stuart Construction Company request any?

A. Yes, I think the Stuart Construction Company requested it, yes.

Q. And that is what you meant there in your deposition? A. Yes. [309]

Q. You didn't request any personally?

A. No, I didn't.

Q. But Stuart Construction Company did?

A. Yes.

Q. And is it true that Plaintiff's Exhibit F is one of those requests? A. That's right.

Q. Did you keep any—excuse me, did you keep any record of your cat time?

A. Mr. Hager said that he would—

Q. Now, just a minute, please, I want you to answer my questions; and I believe I am not trying to be unfair and that this one can be answered yes or no. Did you keep any record of your cat time? Did you? A. Myself, personally?

Q. Yes? A. No.

Q. Did Stuart Construction Company keep any record of its cat time?

A. Mr. Hager said he would take care of that.

Q. Please, Mr. Tope, just answer my question.

(Testimony of Stuart E. Tope.)

Did Stuart Construction Company keep any record of its cat time? A. No. [310]

The Court: Mr. Dunn, are you at a point where we might suspend now until two o'clock?

Mr. Dunn: Yes, sir.

The Court: Court will stand in recess until two o'clock.

(The Court then recessed until two o'clock p.m.)

Afternoon Session

(The Trial Was Continued.)

The Court: Gentlemen, are you ready to proceed?

Mr. Dunn: Shall we proceed, sir?

The Court: Yes, you may.

Mr. Dunn: Your Honor, right aftere you left the bench at noon, discussion arose between myself, and Mr. Nesbett heard part of it, and the Bailiff and the Clerk. Now, we have now offered Defendant's Exhibits A to H and there seemed to be some question as to whether or not some of those exhibits had been offered?

The Court: Well, we will treat them all as in.

Mr. Dunn: They are all admitted into evidence?

The Court: Yes.

Mr. Dunn: That was my understanding, your Honor. I previously offered a certificate [311] of compliance in connection with Stuart Construction Company and you asked that it be held in abeyance.

(Testimony of Stuart E. Tope.)

I have obtained an even later one. The one I now have is dated August 12; it strikes me that it is timely to offer that at this time, which I would like to do.

The Court: Go ahead and offer it. Of course, now, if Stuart Construction Company dissolved, the only authority in the world—dissolved of the—you are shaking your head, what about?

Mr. Dunn: No contention that it is dissolved, your Honor.

The Court: What is the contention then?

Mr. Dunn: I offered to show that it has not complied.

The Court: Maybe it hasn't.

Mr. Dunn: With the Territorial statutes.

The Court: And any person that is aggrieved by it can assert a claim under a contract or repudiate a contract if it is guilty of ultra vires.

Mr. Dunn: We have a Territorial statute to the effect that failing to file annual reports or pay corporate taxes—— [312]

The Court: Deprives it of its charter powers?

Mr. Dunn: No, sir; imposes a penalty of a corporation's being able to neither initiate or maintain a suit; it is for that purpose that I have offered it.

The Court: If that is so, why call my attention to that statute, and if it hasn't complied, why, of course, disabled from maintaining a suit, if that is the statute.

Mr. Nesbett: I got a glance at this the other day and I thought your Honor ruled then that was

(Testimony of Stuart E. Tope.)

a matter of testimony to be brought up at the time of the case.

The Court: That was my viewpoint, exactly, but at this early stage, if corporate rights are challenged and there is a Territorial statute that says it has failed to comply with law, it has no right to go into court and there is a penalty, of course, it is my right to take notice of it.

Mr. Nesbett: Well, he is correct, that it says a corporation can't maintain or commence a suit. The commencement, of course, there is no claim here that when he commenced it the [313] corporation wasn't thoroughly qualified to commence the suit.

The Court: I understand he says the statute says they can't maintain a suit.

Mr. Dunn: Yes.

The Court: And they are authorized to commence it but not authorized to maintain it, that is, if that is the statute, it is already to take that into account, so I gather from both the testimony—both parties are trying to get rid of the corporation and the corporation contract.

Mr. Nesbett: It isn't too much concern to me, but then on the other hand, it has come up before during the trial of cases and the judges have ruled that annual reports, and that is what they are complaining about in this case—not complaining but just saying they haven't filed them, are delinquent; they can be filed even during the trial of the case, and I say this is no time to bring up a matter of

(Testimony of Stuart E. Tope.)

defense. As a matter of fact, the corporation forwarded its two annual reports showing that it was a dormant corporation, but nevertheless it has forwarded them and, therefore, the case is—before the case is over there will be a telegram from [314] the director of finance saying the corporation does comply; even this certificate says it has paid its taxes and it is current in its taxes, but, as I submit, this is no time to bring the matter up as a defense.

The Court: Well, of course, if the statute work main applies in the case and the corporation is out, why we ought to know it. You say the steps have been made to remedy any defect in its authority, and that complies with the statute, and that the statute work main does not apply, why, of course, it can go on and maintain a suit. But I understand here, as I gathered from your proof and that of Mr. Dunn, there is a steadied effort on both sides to eliminate the corporation from this contract.

Mr. Nesbett: It does appear that way and——

The Court: If that is true, why then we are—it is carrying coals to Newcastle, if I may use that homely expression, to go on about the corporate authority. As I understand it, corporation—the rule is now, the Legislature has a right to enact the law that would impair the rights of the corporation if it failed to [315] comply with the law. There is no question about that, but when a corporation is in existence there is nobody that can destroy the authority but the—the State, Territory has its own

(Testimony of Stuart E. Tope.)

means to dissolve a corporation; no court or anybody else can do that. If it exceeds the authority, the only person who can raise the question is the one who is burdened by the fact, that is, the fact that it did exceed its authority. It can repudiate a contract or claim liability in a proper case because it did exceed its authority, because it is guilty—it would be guilty of *ultra vires*. But counsel tells me you have a State statute that is binding upon us; that if a corporation fails to do certain things after it has been incorporated, then it loses its power to maintain a suit or to bring—commence suit or maintain a suit, and you tell me that, if that is true, you are going to follow a precedent here and be corrected by taking it out of the dormant status and give it an active status. Again, if that is true and—moreover so I see no occasion to make a ruling on that question, because somehow I have the impression up to date that the corporation is out of the [316] case anyhow.

Mr. Nesbett: Well, it is further complicated, I don't know whether Mr. Dunn had considered it, but the corporation may not be able to commence the suit or maintain the suit, your Honor, but our statute says that a corporation in spite of not having complied with the payment of taxes and filing of annual reports can always be sued. They have seen fit to counterclaim against this corporation for about \$26,000.00; they couldn't possibly dismiss the case unless they wanted to dismiss their counterclaim; the fact that they have filed a counterclaim

(Testimony of Stuart E. Tope.)

brings the corporation into court and you can't kick the corporation out of court; you have got to settle all the matters connected with it anyway.

The Court: Of course, that is for the State to do in its matter of dissolution. The only question before me is whether it is qualified to maintain its action here. However, I am not ruling adversely; I am not ruling in favor of it, or against it at this time. Counsel has offered these records and at the proper time I will deem it my duty to consider whether or not—if I may [317] call it a statute work main that was used years ago in the common law. The first part of the common law is the parliamentary Act, so I will receive this in evidence and see what effect it will have.

Mr. Dunn: That will be Defendant's Exhibit I, your Honor.

The Court: Defendant's Exhibit I.

Mr. Dunn: If my records are correct.

The Court: I think you are correct about it, at least my notes show that. Now, that makes it an exhibit and tells me what that is.

Mr. Dunn: Yes, sir.

The Court: Certificate?

Mr. Dunn: It is what we term Certificate of Compliance; it is a certificate issued by the Director of Finance of the Territory of Alaska.

The Court: Certificate of Compliance or certificate of failure to comply?

Mr. Dunn: It is called a certificate of compliance, and what it does, it states the degree of com-

(Testimony of Stuart E. Tope.)

pliance; it may show that they fully complied and it may show that they are delinquent. [318]

Q. (By Mr. Dunn): Mr. Tope, I hand you this paper and ask you if it is not entitled, "Financial and Operating Statement of Stuart Construction Company, Inc."? Is it so entitled? A. Yes.

Q. Is that the original of the document that is photostated and attached to your deposition as Defendant's Exhibit 1?

A. I don't know whether this is the original or not; it could be.

Q. Well, is that the same as——

A. It is the same as the one in the deposition, I presume I would have to look and check it.

Q. Well, if there is any question in your mind——

The Court: If you will examine it, let's treat it as if it is the same——

Mr. Dunn: I would like to offer this, your Honor; it is the financial statement.

The Court: Very well. As of what period—what is the date of it?

Mr. Dunn: It reads, your Honor, "Financial and Operating Statement, Stuart Construction Company, Inc., November 12, 1952, through September 30, 1954."

The Court: Now that is November 12, [319] 1952, to November 30——

Q. Through November 30, 1954.

Mr. Nesbett: Your Honor, I have no objection except that that isn't the complete statement fur-

(Testimony of Stuart E. Tope.)

nished on that date for that period of time and I have the complete statement here. I will give it to Mr. Dunn and I insist that it be entered.

Mr. Dunn: I prefer the complete one; I thought I had it, your Honor.

The Court: If that is not a complete statement, why, of course, we will take the complete statement.

Mr. Dunn: Mr. Nesbett, this one that you have bears some notations; I take it, of your own? The part that you object to, these two pages here. Is that not right?

Mr. Nesbett: Yes.

Mr. Dunn: Then may I—do you have any objection to offering these three pages?

Mr. Nesbett: No.

Mr. Dunn: No further questions, your Honor.

The Court: Any recross?

Mr. Nesbett: Yes, your Honor, I have [320] some redirect.

The Court: I meant redirect; I didn't mean recross.

Mr. Nesbett: Your Honor, for the purpose of the record, I should like to read pages 52, 53, and 54 of the deposition of Mr. Tope.

The Court: Now, pages——

Mr. Nesbett: 52, 53, and 54, taken on February 18, 1957, by Mr. Dunn.

Mr. Dunn: Excuse me, your Honor, before he begins that, if I understood your Honor correctly,

(Testimony of Stuart E. Tope.)

an objection lies. I understood your Honor to rule that the deposition itself is admissible?

The Court: That is right.

Mr. Dunn: Only for the purpose of impeaching the witness.

The Court: That is right. Now, then, counsel have a right, has a right, it is all in evidence, he has a right to read any portion of it that he wants to.

Mr. Nesbett: Or all of it; I don't want to read all of it.

The Court: It is all in evidence; he [321] has a right to call any attention to any portion he desires.

Mr. Dunn: I thought it was in evidence only for the purpose of impeachment?

The Court: That is right, but for that purpose counsel has a right to read it.

Mr. Dunn: What he is reading now is directed toward impeachment.

The Court: He has a right to vindicate the witness, rehabilitate the witness, if the deposition goes that far.

Mr. Nesbett: I am using only the points that were used and to read the entire questions and answers.

The Court: I presume that.

Mr. Nesbett: Your Honor, commencing at page 52 of the deposition and up at line 1: "Question: Some point in time, you mean? Answer: Yes. Ques-

(Testimony of Stuart E. Tope.)

tion: And when was that, approximately, as best you can remember? Answer: In May some time."

Mr. Dunn: Excuse me, again, I don't—I have lost you. Are you reading Mr.—what deposition are you reading, please?

Mr. Nesbett: Deposition of Stuart E. [322] Tope, commencing on page 52, at line 1.

Mr. Dunn: May I compare, I don't have that? Oh, I beg your pardon.

The Court: Now, Mr. Nesbett, would you read that first again? I didn't understand the first.

Mr. Dunn: I apologize, sir.

The Court: That is all right, those things will happen.

Mr. Nesbett: Your Honor, the question commences rather disconnected and I only read it on line 1; it doesn't——

"Question: Some point in time, you mean? Answer: Yes.

"Question: And when was that, approximately, as best you can remember? Answer: In May some time.

"Question: That was after you left the job then? Answer: Yes.

"Question: So you got along all right with Crawford? Answer: Yes.

"Question: Did you know a Mr. Warren Hager? Answer: Yes.

"Question: What was he on this job? Answer: General Foreman, I guess.

(Testimony of Stuart E. Tope.)

“Question: What was his relationship to [323] you? Answer: Well, he was my boss.

“Question: How did you get along with him? Answer: Well, we had a few words.

“Question: Just a few? Answer: Well, I’d say a few, yes.

“Question: Generally speaking, did you get along all right with him? Answer: As far as I know, yes.

“Question: Do you know a Mr. Vince Abbott? Answer: Yes.

“Question: What was he on this job? Answer: I will tell you there was so many of them I couldn’t tell you what his capacity was.

“Question: Did he have any relationship to you at all? Answer: Yes.

“Question: And what was his relationship to you? Answer: He was another one of my bosses.

“Question: How did you get along with him? Answer: I never had any words with him.

“Question: Got along all right with him? Answer: Yes.

“Question: And how about a Mr. Allred, do you remember a man by that name? Answer: Yes.

“Question: Was he one of your bosses, too, on this pipeline job? Answer: He was at the [324] other section.

“Question: He was never over you then? Answer: No.

“Question: Were there any other foremen or superintendents on this job whom you considered your boss? Answer: I don’t think so.